

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 899.

THE UNITED STATES, PLAINTIFF IN ERROR,

VS.

HERMAN H. OPPENHEIMER ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error.....	1	1
Clerk's return to writ of error.....	2	1
Petition for writ of error.....	4	2
Indictment—No. 2641, Docket 6-333.....	5	3
Indictment—No. 2642, Docket 6-334.....	14	8
Demurrer of defendant, Herman H. Oppenheimer.....	23	14
Motion to quash, plea in bar and abatement, on behalf of Herman H. Oppenheimer.....	24	15
Indictment—No. 2382, Docket 7-278.....	26	16
Demurrer of defendant, Herman H. Oppenheimer.....	36	22
Motion to quash on behalf of Herman H. Oppenheimer.....	40	24
Affidavit of Herman H. Oppenheimer.....	43	26
Affidavit of Herbert A. Mossler.....	46	27
Additional affidavit of Herbert A. Mossler.....	48	28
Exhibit—Testimony of Herman H. Oppenheimer before referees in bank- ruptcy.....	50	29
Notice of motion that plea in abatement be stricken from the record.....	76	42
Notice of motion to strike out demurrer, etc.....	78	43
Affidavit of Samuel Hershenstein.....	79	43
Docket entries.....	81	44
Opinion, Thomas, J., dismissing indictments.....	82	45
Opinion, Pope, J., quashing indictment.....	86	47
Order quashing indictment.....	89	49
Assignment of errors.....	90	50
Citation and service.....	92	51
Stipulation to correct record.....	93	51
Stipulation of counsel and addition to record.....	97	52
Plea in abatement.....	98	53
Plea in bar.....	104	55
Joinder in demurrer to indictment.....	109	58



1 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court of the United States for the Southern District of New York, in the Second Circuit, before you or some of you, between the United States of America and Herman H. Oppenheimer et al., a manifest error hath happened to the great damage of the said United States of America, as by its complaint appears:

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days of the date hereof; that the record and proceedings aforesaid being accepted, the said Supreme Court may cause further to be done therein to correct that error, what by right and according to the laws and customs of the United States should be done.

2 Witness, The Honorable Edward D. White, Chief Justice of the United States, the 26th day of February, in the year of our Lord one thousand nine hundred and sixteen.

ALEX. GILCHRIST, Jr.,
*Clerk, U. S. District Court for the
Southern District of New York.*

The foregoing writ is hereby allowed.

AUGUSTUS W. HAND,
*United States District Judge for the
Southern District of New York.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., clerk of the District Court of the United States of America for the Southern District of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to ninety-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of United States of America, plaintiff in error, against Herman H.

Oppenheimer et al., defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the second circuit, this 11th day of March, in the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States the one hundred and fortieth.

[SEAL.]

ALEX. GILCHRIST, Jr., *Clerk*.

(Indorsed:) C. 7-278. U. S. District Court, Southern District of New York. United States of America versus Herman H. Oppenheimer et al. Writ of error. H. Snowden Marshall, United States attorney, attorney for U. S. Service of a copy of the within is hereby admitted. New York, Feb. 28, 1916. Kellogg & Rose, attorneys for defts., to Messrs. Kellogg & Rose, attorney for defts., 115 Broadway, New York, N. Y.

4

Petition for writ of error.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA,

vs.

HERMAN H. OPPENHEIMER et al.

Now comes The United States of America, by its attorney, H. Snowden Marshall, and complains that in the record and proceedings had in this cause, and in the order and judgment sustaining defendant's motion to quash the indictment herein, and dismissing said indictment, which judgment was duly made and filed in the office of the clerk of the United States District Court for the Southern District of New York, on February 2, 1916, and the amended judgment which was filed on February 14, 1916, and which order was duly made and filed in the office of the said clerk of the District Court for the Southern District of New York, on the 26th day of February, 1916, a manifest error has happened as will appear in the assignment of errors herewith submitted.

Wherefore, The United States of America prays for the allowance of a writ of error, and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated: New York, February 26th, 1916.

H. SNOWDEN MARSHALL,
U. S. Attorney.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 26, 1916.

5 *Indictment.*

District Court of the United States of America for the Southern District of New York.

At a stated term of the District Court of the United States of America for the Southern District of New York, begun and held in the city of New York, within and for the district aforesaid, on the first Tuesday of February, in the year of our Lord one thousand nine hundred and fourteen, and continued by adjournment to and including the 24th day of February, in the year of our Lord one thousand nine hundred and fourteen.

SOUTHERN DISTRICT OF NEW YORK, ss:

The grand jurors of the United States of America, within and for the district aforesaid, on their oath present that during the year nineteen hundred and twelve, and up to and including the fifth day of August, nineteen hundred and twelve, Jacques Samuels and Joseph Samuels, late of the city and county of New York, were engaged in business at No. 129 West 20th Street, in the city, county, and State of New York as co-partners, doing business under the firm name of Joseph Samuels & Company, as manufacturers and dealers in braids and embroideries, and kindred merchandise; that Jacques Samuels was and is a resident of the city and county of New York; that Joseph Samuels was and is a resident of the city and county of New York; that Abraham Samuels was and is a resident of the city and county of New York; that Ray Abrahams was and is a resident of the city and county of New York; that Herman J. Dietz was and is a resident of the city and county of New York; that Isaac Anderson was and is a resident of the city and county of New York; that Charles Hepner was and is a resident of the city and county of New York; that Herman H. Oppenheimer was and is an attorney at law in the city of New York, with offices at 170 Broadway, city and county of New York; that on the fifteenth day of June, nineteen hundred and twelve, and continuously on all other days thereafter to and including the 24th day of February, in the year of our Lord one thousand nine hundred and fourteen, in the county of New York, Southern District of New York, and within the jurisdiction of this court and under the circumstances aforesaid, the said Jacques Samuels and Joseph Samuels, co-partners doing business as aforesaid, under the firm name of Joseph Samuels & Company, as aforesaid, and the said Abraham Samuels, Ray Abrahams, Herman J. Dietz, Isaac Anderson, Charles Hepner, and Herman H. Oppenheimer then and there anticipated, contemplated, and planned that a petition in bankruptcy should thereafter be filed to have the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually

and as a copartnership, adjudicated bankrupts under the bankruptcy laws of the United States; that thereafter, in the due course of the bankruptcy proceedings, a trustee for the estate in bankruptcy of the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as a copartnership, should be duly appointed.

And the grand jurors aforesaid, on their oath aforesaid, do further present that on the fifth day of August, nineteen hundred and twelve, a petition in bankruptcy was duly filed in the United States District Court for the Southern District of New York to have the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as copartners, adjudicated bankrupts; that on the 5th day of August, nineteen hundred and twelve, Alexander S. Webb was duly appointed receiver of the assets and effects of the said copartnership of the said Jacques Samuels and Joseph Samuels, copartners doing business as aforesaid, and of the individual estates of said Jacques Samuels and Joseph Samuels, and on the sixth day of August, 1912, the said Alexander S. Webb duly qualified as such; that on the 23rd day of October the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as copartners, were adjudicated bankrupts by the said United States district court; that on the fourth day of November, nineteen hundred and twelve, Alexander S. Webb was duly appointed trustee of the assets and effects of the estate in bankruptcy of the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph

Samuels & Co., and of their individual estates, and the said
8 Alexander S. Webb, on the thirteenth day of November, nineteen hundred and twelve, duly qualified as such.

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Ray Abrahams, Herman J. Dietz, Isaac Anderson, Charles Hepner, and Herman H. Oppenheimer, on the 15th day of June, 1912, and continuously on all other days thereafter to and including the 24th day of February, nineteen hundred and fourteen, in the county of New York, Southern District of New York, and within the jurisdiction of this court and under the circumstances aforesaid, did willfully, knowingly, and unlawfully conspire together to commit an offense against the United States, that is to say, the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Ray Abrahams, Herman J. Dietz, Isaac Anderson, Charles Hepner, and Herman H. Oppenheimer did willfully, knowingly,

and unlawfully conspire and corruptly and fraudulently agree among themselves that they would knowingly and fraudulently, while the said Jacques Samuels and Joseph Samuels, individually and as copartners doing business as aforesaid under the firm name of Joseph Samuels & Co., should be bankrupts as aforesaid, conceal from said Alexander S. Webb, the trustee of the said estates in bankruptcy, certain properties and moneys, which would, in the due course of the administration of said estates in bankruptcy belong to the said estates in bankruptcy, to wit, certain moneys which had theretofore been on deposit in banking institutions in the city of New York, to the credit of said Jacques Samuels and Joseph Samuels and of said copartnership Joseph Samuels & Co., to an amount upwards of one thousand dollars (\$1,000.00), and property consisting of certain shares of stock of the Borough Apartment Company, a corporation existing and organized under the laws of the State of New

9 York, which said certificates of stock had been issued by said Borough Apartment Company in the name of the said Jacques Samuels and said Joseph Samuels and were the property of said copartnership of Joseph Samuels & Company, the value of said certificates of stock being upwards of the sum of one thousand dollars (\$1,000.00), and other property, the kind, amount, and particular description of which, and the exact amount and value of which, is now to the grand jurors unknown.

And in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels and Abraham Samuels did on or about June 28th, nineteen hundred and twelve, in the county of New York, Southern District of New York, make and cause to be made false and fictitious entries in a certain book called "time-book" belonging and appertaining to the business of Joseph Samuels & Co., whereby it was made to appear that one William Erlich was employed by said copartnership on January 6, nineteen hundred and twelve, and continuously thereafter until May 6th, 1912, and had received from said copartnership for said services the sum of forty dollars (\$40.00) a week on January 6th, 1912, and continuously weekly thereafter up to and including May 6th, 1912, whereas, in truth and in fact, the said William Erlich was not employed by said copartnership until May 6th, 1912, and did not receive from said copartnership any sum or sums of money for services prior to said May 6th, 1912.

And further in pursuance of and to effect the object of said conspiracy, said Jacques Samuels and said Joseph Samuels did, on or about June 20th, 1912, destroy a certain book of account belonging and appertaining to the business of said copartnership of Joseph Samuels & Co., called purchase ledger, and certain other books of

account, the number and more particular description of which are now to the grand jurors unknown.

10 And further in pursuance of and to effect the object of said conspiracy, the said Ray Abrahams did on or about November 25th, 1912, receive from said Jacques Samuels a large sum of money, an amount in excess of one thousand dollars (\$1,000.00), the exact amount of which is now to the grand jurors unknown, the property of said copartnership of Joseph Samuels & Co., and which would, in the due course of the administration of said estates in bankruptcy, become the property of the said estate in bankruptcy of the said copartnership of Joseph Samuels & Co., and did thereafter conceal the said moneys from said Alexander S. Webb, the trustee of the estate in bankruptcy of the said copartnership.

And further in pursuance of and to extend the object of said conspiracy, the said Herman J. Dietz did, on or about June 28th, 1912, sign and deliver to said Jacques Samuels a certain promissory note, for the sum of forty-five hundred dollars (\$4,500.00), which said note was marked "nonnegotiable," and was in words and figures as follows:

\$4,500.00

NEW YORK, May 16, 1912.

Four months after date, I promise to pay to Joseph Samuels & Co. forty-five hundred 00/100 dollars, at the Columbia Bank, 407 Bway, N. Y.

Value received.

Nonnegotiable.

No. Due Sept. 16.

H. J. DIETZ.

And further in pursuance of and to effect the object of said conspiracy, the said Isaac Anderson did, on June 17th, 1912, write his endorsement upon the back of a certain check drawn by said

11 Jacques Samuels in the name of Joseph Samuels & Co., upon the Second National Bank of the City of New York, to the order of "I. Anderson" in the amount of three thousand dollars (\$3,000.00), which said check and said endorsement on the back of said check are as follows:

Face of check.

JOSEPH SAMUELS & Co.
Braid and Embroideries.

No. 17

NEW YORK, June 17, 1912.

Pay to the order of I. Anderson \$3,000⁰⁰/₁₀₀ (three thousand 00/100 dollars).

To the Second National Bank
of the City of New York.

JOS. SAMUELS & Co.

Back of check.

Endorsements: I. Anderson, Jos. Samuels & Co., Harry Siegel.

And further, in pursuance of and to effect the object of said conspiracy, the said Charles Hepner did, on July 25th, 1912, write his endorsement upon the back of a certain check drawn by the said Jacques Samuels, in the name of Joseph Samuels & Co., upon the Pacific Bank in the city of New York, to the order of Charles Hepner, in the amount of \$405.40, which said check and the endorsement upon the back of said check are as follows:

Face of check.

No. 160

NEW YORK, July 25, 1912.

The Pacific Bank,
Madison Avenue Branch—28th St.

Pay to the order of Charles Hepner four hundred & five 40/100 dollars.

\$405⁴⁰/₁₀₀

JOS. SAMUELS & Co.

12

Back of check.

Jos. Samuels & Co. Charles Hepner.

And further, in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels did, on July 22nd, 1912, take from the funds of said copartnership of Joseph Samuels & Co. the sum of \$1,100.00, which said sum of money would, in the due course of the administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said copartnership, and did conceal and secrete the said sum of \$1,100.00 from said Alexander S. Webb, the trustee of said estate in bankruptcy.

And further, in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels did, on July 26th, 1912, take from the funds of said copartnership of Joseph Samuels & Co. the sum of \$2,500.00, which said sum of money would, in the due administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said copartnership, and did conceal and secrete the said sum of \$2,500.00 from said Alexander S. Webb, the trustee of said estate in bankruptcy.

And further, in pursuance of and to effect the object of said conspiracy, the said Herman H. Oppenheimer, on July 29th, 1912, received the sum of one thousand dollars (\$1,000.00) from the said copartnership of Joseph Samuels & Company; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

H. SNOWDEN MARSHALL,
United States Attorney.

13 (Endorsed) 2461-6-333. U. S. District Court. The United States of America vs. Jacques Samuels and Joseph Samuels, doing business under the firm name of Samuels & Co., Abraham Samuels, Ray Abrahams, Herman J. Dietz, Charles Hepner and Herman H. Oppenheimer, and Isaac Anderson. Indictment: Conspiracy to conceal assets from trustee in bankruptcy. U. S. Rev. Stat., sec. 29b, Bankruptcy Act, 37 U. S. C. C. H. Snowden Marshall, U. S. attorney. A true bill, Henry Lewis, foreman. U. S. District Court, S. D. of N. Y., filed Feb. 24, 1914.

Feby. 25th, 14. H. H. Oppenheimer arraigned and pleads not guilty. Leave to withdraw by Mch. 20/14.

Ray Abrahams, same entry as above.

Jacques Samuels, same entry as above.

Joseph Samuels, same entry as above.

Abraham Samuels, same entry as above.

Charles Hepner, same entry as above.

Bail previously given to stand.

Feb. 26. H. J. Dietz pleads not guilty.

Feb. 27. Isaac Anderson pleads not guilty.

Mch. 24. Filed demurrer of A. Samuels, C. Hepner, R. Samuels.

Oct. 1. Filed opinion, Thomas J. Indictment dismissed as to Oppenheimer, Abr. Samuels, Chas. Hepner, Ray Abrahams.

14

Indictment.

District Court of the United States of America for the Southern District of New York.

At a stated term of the District Court of the United States of America for the Southern District of New York, begun and held in the City of New York, within and for the District aforesaid, on the first Tuesday of February in the year of our Lord one thousand nine hundred and fourteen, and continued by adjournment to and including the 24th day of February in the year of our Lord one thousand nine hundred and fourteen.

SOUTHERN DISTRICT OF NEW YORK, ss:

The grand jurors of the United States of America, within and for the district aforesaid, on their oath present that during the year nineteen hundred and twelve, and up to and including the fifth day of August, nineteen hundred and twelve, Jacques Samuels and Joseph Samuels, late of the city and county of New York, were engaged in business at No. 129 West 20th Street, in the city, county, and State of New York as copartners, doing business under the firm name of Joseph Samuels & Co., as manufacturers and dealers in braids and embroideries, and kindred merchandise; that Jacques Samuels was

and is a resident of the city and county of New York; that Joseph Samuels was, and is a resident of the city and county of New York; that Abraham Samuels was and is a resident of the city and county of New York; that Reuben Samuels was and is a resident of the city and county of New York, and that Ray Abrahams was and is a resident of the city and county of New York; that Herman J. Dietz was and is a resident of the city and county of New York;

15 that Isaac Anderson was and is a resident of the city and county of New York; that Charles Hepner was and is a resident of the city and county of New York; that Herman H. Oppenheimer was and is an attorney at law in the city of New York, with offices at 170 Broadway, city and county of New York; that on the fifteenth day of June, nineteen hundred and twelve, and continuously on all other days thereafter to and including the 24th day of February, in the year of our Lord one thousand nine hundred and fourteen, in the county of New York, Southern District of New York, and within the jurisdiction of this court and under the circumstances aforesaid, the said Jacques Samuels and Joseph Samuels, copartners doing business as aforesaid, under the firm name of Joseph Samuels & Company, as aforesaid, and the said Abraham Samuels, Reuben Samuels, Ray Abrahams, Herman J. Dietz, Isaac Anderson, Charles Hepner, and Herman H. Oppenheimer then and there anticipated, contemplated, and planned that a petition in bankruptcy should thereafter be filed to have the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as a copartnership, adjudicated bankrupts under the bankruptcy laws of the United States; that thereafter, in the due course of the bankruptcy proceedings, a trustee for the estate in bankruptcy of the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as a copartnership, should be duly appointed.

And the grand jurors aforesaid, on their oath aforesaid, do further present that on the fifth day of August, nineteen hundred and twelve, a petition in bankruptcy was duly filed in the United States District Court for the Southern District of New York to have the said Jacques

Samuels and Joseph Samuels, doing business as aforesaid under

16 the firm name of Joseph Samuels & Co., individually and as copartners, adjudicated bankrupts; that on the 5th day of August, nineteen hundred and twelve, Alexander S. Webb was duly appointed receiver of the assets and effects of the said copartnership of the said Jacques Samuels and Joseph Samuels, copartners doing business as aforesaid, and of the individual estates of said Jacques Samuels and Joseph Samuels, and on the sixth day of August, 1912, the said Alexander S. Webb duly qualified as such; that on the 23rd

sign and deliver to said Jacques Samuels a certain promissory note, for the sum of forty-five hundred dollars (\$4,500.00), which said note was marked "Non negotiable," and was in words and figures as follows:

\$4,500⁰⁰/₁₀₀

NEW YORK, May 16, 1912.

Four months after date, I promise to pay to Joseph Samuels & Co., Forty-five hundred 00/100 dollars, at The Columbia Bank, 407 Bway, N. Y.

Value received

Non negotiable

No. ——— Due Sept. 16

H. J. DIETZ.

And further in pursuance of and to effect the object of said conspiracy, the said Isaac Anderson did, on June 17th, 1912, write his endorsement upon the back of a certain check drawn by said Jacques Samuels in the name of Joseph Samuels & Co., upon the Second National Bank of the City of New York, to the order of "I. Anderson" in the amount of three thousand dollars (\$3,000.00), which said check and said endorsement on the back of said check are as follows:

Face of check.

20 JOSEPH SAMUELS & CO.

No. 17

Braid and Embroideries.

NEW YORK, June 17, 1912.

Pay to the order of I. Anderson \$3,000⁰⁰/₁₀₀.

Three thousand 00/100 Dollars.

To the Second National Bank of the City of New York.

JOS. SAMUELS & Co.

Back of check.

Endorsements: I. Anderson, Jos. Samuels & Co., Harry Siegel.

And further in pursuance of and to effect the object of said conspiracy, the said Charles Hepner did, on July 25th, 1912, write his endorsement upon the back of a certain check drawn by the said Jacques Samuels in the name of Joseph Samuels & Co., upon the Pacific Bank in the city of New York, to the order of Charles Hepner in the amount of \$405.40, which said check and the endorsement upon the back of said check are as follows:

Face of check.

No. 160.

NEW YORK, July 25, 1912.

THE PACIFIC BANK,

Madison Avenue Branch—28th St.

Pay to the order of Charles Hepner Four hundred & five 40/100 dollars. \$405⁴⁰/₁₀₀.

JOS. SAMUELS & Co.

Back of check.

Jos. Samuels & Co. Charles Hepner.

21 And further, in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels did, on July 22nd, 1912, take from the funds of said copartnership of Joseph Samuels & Co., the sum of \$1,100.00, which said sum of money would, in the due course of the administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said copartnership, and did conceal and secrete the said sum of \$1,100.00 from said Alexander S. Webb, the trustee of said estate in bankruptcy.

And further, in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels did, on July 26th, 1912, take from the funds of said copartnership of Joseph Samuels & Co. the sum of \$2,500.00, which said sum of money would, in the due administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said copartnership, and did conceal and secrete the said sum of \$2,500.00 from said Alexander S. Webb, the trustee of said estate in bankruptcy.

And further, in pursuance of and to effect the object of said conspiracy, the said Herman H. Oppenheimer, on July 29th, 1912, received the sum of one thousand dollars (\$1,000.00) from the said copartnership of Joseph Samuels & Company; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

H. SNOWDEN MARSHALL,
United States Attorney.

22 (Endorsed:) 2462. 6-334—U. S. District Court. The United States of America vs. Jacques Samuels and Joseph Samuels, doing business under the firm name of Samuels & Co., Abraham Samuels, Reuben Samuels, Ray Abrahams, Herman J. Dietz, Charles Hepner, and Herman H. Oppenheimer, and Isaac Anderson. Indictment: Conspiracy to conceal assets from trustee in bankruptcy. Sec. 29b Bankruptcy Act, 37, U. S. C. X. H. Snowden Marshall, U. S. attorney. A true bill, Henry Lewis, foreman. U. S. District Court, S. D. of N. Y., filed Feb. 24, 1914.

Feb'y 25th, '14. H. H. Oppenheimer arraigned and pleads not guilty—leave to withdraw by M'ch 20/14. Bail, \$2,500.00.

Reuben Samuels arraigned and pleads n. g. Time to withdraw as above.

• Ray Abrahams, same entry as above.

Jacques Samuels, same entry as above.

Joseph Samuels, same entry as above.

Abraham Samuels, same entry as above.
 Chas. Hepner, same entry as above.
 Bail previously given to stand.
 Feb. 26, H. J. Dietz pleads not guilty.
 Feb. 27, Isaac Anderson pleads not guilty.
 May 1, 1914. Filed motion to quash.
 M'ch 24. Filed demurrer of H. H. Oppenheimer.
 Oct. 1. Filed opinion, Thomas, J. Demurrer sustained. Indictment dismissed as to H. Oppenheimer, A. Samuels, C. Hepner, R. Abrahams.

23 *Demurrer of Herman H. Oppenheimer.*

United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA

against

JACQUES SAMUELS AND JOSEPH SAMUEL, DOING BUSINESS UNDER THE FIRM NAME OF SAMUELS & CO., ABRAHAM SAMUELS, REUBEN SAMUELS, RAY ABRAHAMS, HERMAN J. DIETZ, CHARLES HEPNER, HERMAN H. OPPENHEIMER, AND ISAAC ANDERSON.

The above-named defendant, Herman H. Oppenheimer, demurs to the indictment in the above-entitled matter filed herein February 24th, 1914, and he demurs to each and every part of said indictment and alleges as ground for such demurrer:

First. That the said indictment fails to charge an offense under the laws of the United States against him.

Second. That it appears on the face of the indictment that any offense attempted to be charged against this defendant is barred by the statute of limitations.

Dated, New York, March 24, 1914.

KELLOGG & ROSE,
*Attorneys for Herman H. Oppenheimer, office
 and post office address, 115 Broadway,
 Borough of Manhattan, City of New York.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 24, 1914.

24 United States District Court for the Southern District of New York.

UNITED STATES, PLAINTIFF,
against

JACQUES SAMUELS, JOSEPH SAMUELS, REUBEN
Samuels, Abraham Samuels, Ray Abra-
hams, Charles Hepner, Isaac Anderson,
Herman J. Dietz, and Herman H. Oppen-
heimer, et al., defendants.

Motion to quash plea
in bar and abate-
ment on behalf of
Herman H. Op-
penheimer.

And now comes defendant, Oppenheimer, and moves this court to set aside the indictment filed in this case for that—

1. The indictment is barred by the statute of limitations contained in section 29d of the bankruptcy law of 1898.

2. The indictment does not set forth facts sufficient to constitute a crime under the laws of the United States now in force.

3. That the facts set forth in the indictment are indefinite and uncertain and do not inform the defendant sufficiently of the nature of the charge against him, as provided for by law.

4. The indictment does not charge a defense cognizable by this court or covered by the statutes of the United States of America.

5. This court has no jurisdiction over the crime attempted to be alleged and the person charged therewith.

25 6. That the grand jury that turned in the indictment has no jurisdiction to indict the defendant, Oppenheimer, for the subject matter stated in this indictment.

Wherefore the defendant, Oppenheimer, prays that the same may be dismissed as to him.

Dated New York, April 13th, 1914.

KELLOGG & ROSE,
Attorneys for Defendant, Oppenheimer,
Office and P. O. address, 115 Broadway,
Borough of Manhattan, New York City.

ABRAM J. ROSE, Esq.,
Of Counsel.

BENJAMIN SLADE, Esq.,
Of Counsel.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar 1, 1914.

District Court of the United States of America for the Southern District of New York.

At a stated term of the District Court of the United States of America for the Southern District of New York, begun and held in the city of New York, within and for the district aforesaid, on the first Tuesday of December in the year of our Lord one thousand nine hundred and fourteen, and continued by adjournment to and including the 21st day of December in the year of our Lord one thousand nine hundred and fourteen.

SOUTHERN DISTRICT OF NEW YORK, ss:

The grand jurors of the United States of America, within and for the district aforesaid, on their oath present, that during the year nineteen hundred and twelve, and up to and including the fifth day of August, nineteen hundred and twelve, Jacques Samuels and Joseph Samuels, late of the city and county of New York; were engaged in business at number 129 West 20th Street, in the city, county, and State of New York, as copartners, doing business under the firm name of Joseph Samuels & Co., as manufacturers and dealers in braids and embroideries, and kindred merchandise; that Jacques Samuels was and is a resident of the city and county of New York; that Joseph Samuels was and is a resident of the city and county of New York; that Abraham Samuels was and is a resident of the city and county of New York; that Herman J. Dietz was and is a resident of the city and county of New York; that Charles Hepner was and is a resident of the city and county of New York; that Herman H. Oppenheimer was and is an attorney at law in the city and county of New York, with offices at number 170 Broadway, city and county of New York; and was the attorney for said Joseph Samuels & Co., individually and as a copartnership as aforesaid; that on the fifteenth day of June, nineteen hundred and twelve, in the county of New York, southern district of New York, and within the jurisdiction of this court, the said Jacques Samuels and Joseph Samuels, copartners doing business as aforesaid, under the firm name of Joseph Samuels & Co., then and there anticipated, contemplated, and planned that a petition in bankruptcy should thereafter be filed to have the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as a copartnership, adjudicated bankrupts under the bankruptcy laws of the United States; and that thereafter, in the due course of the bankruptcy proceedings, a trustee for the estate in bankruptcy of the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as a copartnership, should be duly appointed.

And the grand jurors aforesaid, on their oath aforesaid, do further present that on the fifth day of August, nineteen hundred and twelve, a petition in bankruptcy was duly filed in the United States District Court for the Southern District of New York to have the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as copartners, adjudicated bankrupts; that on the fifth day of August, nineteen hundred and twelve, Alexander S. Webb was duly appointed receiver

of the assets and effects of the said copartnership, doing business as aforesaid, and of the individual estates of said Jacques

Samuels and Joseph Samuels, and on the sixth day of August, nineteen hundred and twelve, the said Alexander S. Webb, duly qualified as such; that on the twenty-third day of October the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as copartners, were duly adjudicated bankrupts by the said United States District Court; that on the fourth day of November, nineteen hundred and twelve, Alexander S. Webb was duly appointed trustee of the assets and effects of the estate in bankruptcy of the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., and of their individual estates, and the said Alexander S. Webb, on the thirteenth day of November, nineteen hundred and twelve, duly qualified as such, and thereafter continued to act as such trustee up to and including the 21st day of December, nineteen hundred and fourteen.

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Jacques Samuels and Joseph Samuels, on the fifteenth day of June, nineteen hundred and twelve, and continuously on all other days thereafter to and including the 21st day of December, nineteen hundred and fourteen, in the county of New York, Southern District of New York, and within the jurisdiction of this court and under the circumstances aforesaid, did wilfully, knowingly, and unlawfully conspire together, and with the said Abraham Samuels, Herman J. Dietz, Charles Hepner, and Herman H. Oppenheimer, and each of them, to commit an offense against the United States, that is to say, the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Herman J. Dietz, Charles Hepner, and

Herman H. Oppenheimer, did wilfully, knowingly, and unlawfully conspire and corruptly and fraudulently agree among themselves that they would knowingly, and fraudulently, while the said Jacques Samuels and Joseph Samuels, individually and as co-partners doing business as aforesaid under the firm name of Joseph Samuels & Co., should be bankrupts as aforesaid, conceal from the said trustee of the said estates in bankruptcy, certain properties and moneys, which would, in the due course of the administration of said estates in bankruptcy, belong to the said estates

in bankruptcy, to wit, certain moneys on deposit in banking institutions in the city of New York to the credit of said Jacques Samuels and Joseph Samuels, and of the said co-partnership Joseph Samuels & Co., to an amount upwards of one thousand dollars (\$1,000.00) and certain other moneys and choses in action which would thereafter become due from customers of the said co-partnership for merchandise sold to said customers by said co-partnership, and property consisting of certain shares of stock of the Borough Apartment Company, a corporation organized and existing under the laws of the State of New York, which said certificates of stock had been issued by the said Borough Apartment Co. in the names of the said Jacques Samuels and said Joseph Samuels, and were the property of said co-partnership of Joseph Samuels & Co., the value of said certificates of stock being upwards of the sum of one thousand dollars (\$1,000.00) and other property, the kind, amount, and particular description of which, and the exact amount and value of which is now to the grand jurors unknown; and the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Herman J. Dietz, Charles Hepner, and Herman H. Oppenheimer did, beginning with the said fifteenth day of June, nineteen hundred and twelve, conceal the aforesaid money and property belonging to the said co-partnership, and continued to conceal the same until the thirteenth day of November, nineteen hundred and twelve, when

30 said Alexander S. Webb was appointed trustee as aforesaid, and since said thirteenth day of November, nineteen hundred and twelve, did continue to conceal the same from said trustee up to and including the 21st day of December, nineteen hundred and fourteen.

And in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels, Abraham Samuels and Herman H. Oppenheimer did on or about the twenty-eighth day of June, nineteen hundred and twelve, in the county of New York, Southern District of New York, make and cause to be made, and counsel and advise the making of false and fictitious entries in a certain book called "time book" belonging and appertaining to the business of Joseph Samuels & Co., whereby it was made to appear that certain persons and employees, employed by said co-partnership had received from said co-partnership for their services more money than such persons and employees had actually received.

And further in pursuance of and to effect the object of said conspiracy, the said Abraham Samuels did, on or about the 28th day of June, 1912, in the county of New York, Southern District of New York, write up and cause to be written up a certain book called "time book" belonging to and pertaining to the business of Joseph Samuels & Company, whereby it was made to appear by the recording of false and fictitious entries therein that certain persons and

employees employed by the said co-partnership had received from said co-partnership for their services more money than such persons and employees had actually received.

31 And further in pursuance of and to effect the object of said conspiracy, said Jacques Samuels, said Joseph Samuels and said Herman H. Oppenheimer did, on or about June 20, 1912, destroy and cause to be destroyed and counsel and advise the destruction of a certain book of account belonging and appertaining to the business of said co-partnership of Joseph Samuels & Co., called "purchase ledger", and certain other books of account, the number and more particular description of which are now to the Grand Jurors unknown.

And further in pursuance of and to effect the object of said conspiracy, the said Herman J. Dietz, at the request and upon the advice of said Jacques Samuels and said Herman H. Oppenheimer, did, on or about June 28, 1912, sign and deliver to said Jacques Samuels a certain promissory note, for the sum of forty-five hundred dollars (\$4,500.00), which said note was marked "Non negotiable," and was in words and figures as follows:

\$4500 $\frac{0}{4}$ ¢.

NEW YORK, May 16, 1912.

Four months after date, I promise to pay to Joseph Samuels & Co. Forty-Five Hundred 00/100 dollars at The Columbia Bank, 407 Broadway, N. Y.

Value received.

Non negotiable.

No. —.

Due Sept. 16.

H. J. DIETZ.

For which promissory note no consideration was paid by said Joseph Samuels & Co., and was made and signed by said Herman J. Dietz for the purpose of making it to appear that the assets of the said estates in bankruptcy were greater than they actually were, as the said Jacques Samuels and the said Herman H. Oppenheimer well knew.

32 And further in pursuance of and to effect the object of said conspiracy, the said Charles Hepner did, on July 25, 1912, write his indorsement upon the back of a certain check drawn by the said Jacques Samuels in the name of Joseph Samuels & Co., upon the Pacific Bank in the City of New York, to the order of Charles Hepner, in the amount of \$405.40, which said check and the indorsement upon the back of said check are as follows:

Face of check.

No. 160.

NEW YORK, July 25, 1912.

The Pacific Bank, Madison Avenue Branch—28th St.

Pay to the order of Charles Hepner Four hundred & five 40/100 dollars.

\$405 $\frac{40}{100}$ ¢.

JOS. SAMUELS & Co.

Back of check.

Jos. Samuels & Co. Charles Hepner.

And further in pursuance of and to effect the object of said conspiracy the said Jacques Samuels did, on July 22, 1912, take from the funds of said copartnership of Joseph Samuels & Co., the sum of \$1100.00, which said sum of money would, in the due course of the administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said copartnership and did conceal and secrete the said sum of \$1100.00 from said Alexandria S. Webb, the trustee of said estate in bankruptcy, and has since said 22nd day of July, 1912, continued to conceal said sum of money from said trustee, to and including the 21st day of December, 1914.

33 And further in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels did, on July 26, 1912, take from the funds of said copartnership of Joseph Samuels & Co. the sum of \$2,500.00, which said sum of money would, in the due administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said copartnership, and did conceal and secrete the said sum of \$2,500.00 from said Alexander S. Webb, the trustee of said estate in bankruptcy, and has, since said 26th day of July, 1912, continued to conceal said sum of money from said trustee up to and including the 21st day of December, 1914.

And further, in pursuance of and to effect the object of said conspiracy and in order to aid and assist the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Charles Hepner, Herman J. Dietz, and Herman H. Oppenheimer, in continuing the concealment from said trustee in bankruptcy of the money and property belonging to the said estates in bankruptcy of the said Joseph Samuels & Co., so concealed from said trustee in bankruptcy, the said Herman H. Oppenheimer, in a bankruptcy proceeding instituted and pending in the United States District Court for the Southern District of New York, to have the said Jacques Samuels and one Benjamin Lesser, individually and as copartners, doing business under the firm name of Abrahams & Lesser, adjudged bankrupts under the bankruptcy laws of the United States, and of which copartnership the said Jacques Samuels was a member and principal owner, was examined before the said Macgrane Cox, Esquire, referee in bankruptcy, in support of an application made by the said Herman H. Oppenheimer for an allowance as the attorney for the said copartnership of Abrahams & Lesser and the said Jacques Samuels as a member of said copartnership; and the said Herman H. Oppenheimer

34 did, then and there, on the 19th day of January, 1914, willfully and falsely testify, in substance and effect, that he had, since the latter part of July, 1912, and up to the said 19th day of January,

1914, received no money or property in said bankruptcy action so pending against Joseph Samuels & Co., individually and as a copartnership as aforesaid, as compensation for legal services, except that he, the said Herman H. Oppenheimer, had received an agreement to be paid compensation in addition to whatever allowance might be made to him by the court for such services out of the estates in bankruptcy of said Joseph Samuels & Co., individually and as a copartnership, as aforesaid, whereas, in truth and in fact, the said Herman H. Oppenheimer did, on or about the 1st day of September, 1912, receive from the said Jacques Samuels a promissory note in and for the sum of \$897.36, with interest, made by the Universal Textile Company, a customer of said Joseph Samuels & Co., dated July 20, 1912, payable two months after date, to the order of Joseph Samuels & Co., and did thereafter, on September 11, 1912, receive payment therefor in the sum of \$897.36, which said promissory note and its proceeds was the property of the said copartnership of Joseph Samuels & Co. and would, in the due administration of the said estates in bankruptcy, have belonged to the said estates in bankruptcy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (§37 U. S. C. C. and §29 b of the bankruptcy act.)

H. SNOWDEN MARSHALL,

U. S. Attorney.

35 (Endorsed:) 7-278, 2882. U. S. District Court, The United States of America vs. Jacques Samuels, Joseph Samuels, Abraham Samuels, Herman J. Dietz, Charles Hepner, and Herman H. Oppenheimer. Indictment: Conspiracy to conceal assets from trustee in bankruptcy. U. S. C. C. Sec. 37 and Sec. 29-b, Bankruptcy Act. H. Snowden Marshall, U. S. attorney. A true bill: Eugene S. Benjamin, foreman. U. S. District Court, S. D. of N. Y. Filed Dec. 21, 1914.

1914, Dec. 22. Oppenheimer pleads not guilty. Bail, \$500.

1915, Jan. 4. Deft. Dietz pleads not guilty. Bail, \$2,500.

Jan. 4. Filed motion to quash; plea in abatement; plea in bar and demurrer as to H. H. Oppenheimer.

Jan. 6. Filed demurrer and motion to quash, and special plea in bar as to H. J. Dietz.

Jan. 20. Dietz withdraws plea of not guilty.

Jan. 21. H. H. Oppenheimer withdraws pleas of not guilty.

Jan. 30. Filed joinder in demurrer.

1916, Feb'y 2. Filed opinion. Pope, J. Indictment ordered quashed and allowing defendants to go without day thereunder.

United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA

against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS,
HERMAN J. DIETZ, CHARLES HEPNER, and HERMAN
H. OPPENHEIMER. } 7-237

Demurrer.

And now comes the defendant, Herman H. Oppenheimer, and moves this court to set aside the indictment filed in this case for the following reasons:

1. It appears from the records of this court that the indictment herein is barred by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462.

2. The indictment is barred by the statute of limitations contained in section 29-d of the Bankruptcy Law of 1898. The indictment does not set forth facts showing it to be a continuous conspiracy, down to its date.

3. The indictment does not set forth facts sufficient to constitute a crime under the laws of the United States now in force.

4. That the facts set forth in the indictment are impossible, indefinite, and uncertain, augmen'tive, hypothetical, and do not inform the defendant sufficiently of the nature of the charge against him, as provided for by law.

37 5. The indictment does not charge an offense cognizable by this court or covered by the statutes of the United States of America.

6. That the grand jury, when it voted this indictment, had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment, against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both, and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment alleges that the defendant, Oppenheimer, gave certain false and fraudulent testimony on January 19th, 1914, and there was no legal or competent evidence before the said grand jury that he had so testified, and there never was such testimony given by said defendant, Oppenheimer.

7. That the grand jury, when it voted this indictment, had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both, and the same more fully appears by the records of the said

grand jury and more particularly from the facts that the said indictment charges the defendant, Oppenheimer, with having received payment of a note given to him by the bankrupt during September 1912. There was no competent legal evidence before the said grand jury of the said fact.

8. That the grand jury, when it voted this indictment, had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against the said defendant,

38 Oppenheimer, and did not have competent legal evidence as to either or both, and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment charges that the defendant, Oppenheimer, conspired with various persons and there was no competent legal evidence before the grand jury of the creation or existence of the said conspiracy.

9. The said grand jury which voted the said indictment was improperly constituted and the members thereof were not proper persons to pass on the said indictment, at least one of them being interested in the subject matter thereof, as a creditor, and the said juror was present while the witnesses were being heard, and as defendant believes, during the deliberations and voted upon the said indictment, which fact was known to all of the said grand jurors who voted on the said indictment, in contravention to the statutes of the United States, now in force in reference to qualifications of grand jurors and to the self-evident injury and harm of the defendant, Oppenheimer.

Wherefore, the said Herman H. Oppenheimer prays judgment of the said indictment whether the United States of America ought or can prosecute him in the premises and that he may be discharged thereof without delay and the indictment quashed.

New York, January 4th, 1915.

KELLOGG & ROSE,
Attorneys for defendant, Oppenheimer,
Office & P. O. Address,
115 Broadway, Manhattan,
New York City.

ABRAM J. ROSE, *of Counsel.*
BENJAMIN SLADE, Esq., *of Counsel.*

39 We hereby certify that the foregoing plea is not interposed for delay but should be sustained on the merits.

NEW YORK, January 4th, 1915.

KELLOGG & ROSE,
Attorneys for defendant, Oppenheimer.

(Endorsed:) Received Jan. 4, 1915, U. S. Attorney's Office. U. S. District Court, S. D. of N. Y. Filed Jan. 4, 1915.

40 United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA,
against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER, AND HERMAN H. OPPENHEIMER. } No. 7-237.

Motion to quash on behalf of Herman H. Oppenheimer.

And, now comes the defendant, Herman H. Oppenheimer, and moves this court to set aside the indictment filed in this case for the following reasons:

1. It appears from the records of this court that the indictment herein is barred by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462.

2. The indictment is barred by the statute of limitations contained in section 29-d of the Bankruptcy Law of 1898.

3. The indictment does not set forth facts sufficient to constitute a crime under the laws of the United States, now in force.

4. That the facts set forth in the indictment are impossible, indefinite and uncertain and do not inform the defendant sufficiently of the nature of the charge against him, as provided for by law.

5. The indictment does not charge an offense cognizable by this court or covered by the statutes of the United States of America.

41 6. That the grand jury, when it voted this indictment had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment, against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment alleges that the defendant, Oppenheimer, gave certain false and willful testimony on January 19th, 1914, and there was no legal or competent evidence before the said grand jury that he had so testified, reference being made to the affidavits of H. H. Oppenheimer and Herbert A. Mossler hereto annexed, and there never was such testimony given by said defendant, Oppenheimer.

7. That the grand jury, when it voted this indictment had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment charges the defendant, Oppenheimer, with having received payment of a note given to him by the bankrupt during September,

1912. There was no competent legal evidence before the said grand jury of the said fact.

8. That the grand jury, when it voted this indictment had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment

alleges that the defendant, Oppenheimer, conspired with various
42 persons and there was no competent legal evidence before the grand jury of the creation or existence of the said conspiracy.

9. The said grand jury which voted the said indictment was improperly constituted and the members thereof were not proper persons to pass on the said indictment, at least one of them being interested in the subject matter thereof as a creditor, and the said juror was present while the witnesses were being heard, and as defendant believes, during the deliberations, and voted upon the said indictment, which fact was known to all of the said grand jurors who voted on the said indictment, in contravention to the statutes of the United States now in force in reference to qualification of grand jurors and to the self-evident injury and harm of the defendant, Oppenheimer.

Wherefore the said Herman H. Oppenheimer prays judgment of the said indictment whether the United States of America ought or can prosecute him in the premises and that he may be discharged thereof without delay and the indictment quashed.

NEW YORK, January 4th, 1915.

KELLOGG & ROSE,

Attorneys for Defendant Oppenheimer,

O. & P. O. address, 115 Broadway, Manhattan, New York City.

ABRAM J. ROSE, Esq.,

Of Counsel.

BENJAMIN SLADE, Esq.,

Of Counsel.

We hereby certify that the above plea is not interposed for delay, but should be sustained on the merits. Dated, New York, January 4th, 1915.

KELLOGG & ROSE,

Attorneys for Defendant Oppenheimer.

43 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA,

against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, Herman J. Dietz, Charles Hepner, and Herman H. Oppenheimer.

No. 7-237.

UNITED STATES OF AMERICA,

Southern District of New York,

State, City, and County of New York, ss:

Affidavit on motion to quash.

Herman H. Oppenheimer, being duly sworn, deposes and says:
That he is one of the defendants herein.

That deponent never gave any evidence in any proceeding as stated in the last paragraph of the indictment herein, as more fully appears by a copy of the said testimony hereto annexed and made part hereof.

Deponent never signed the said testimony, nor were the hearings in the matter in which it was given closed, nor was the said testimony complete, all of which fully appears by the said testimony, and therefore deponent believes no valid indictment can ever be based on the said testimony.

The only persons present at the said hearing besides deponent were Honorable Macgrane Cox, the referee; Frank C. McCarrick, the stenographer; Mr. Herman Heidelberg, Mr. Thomas Adams, and Mr. Grenville Clark. Your deponent has asked Herman Heidelberg,

44 Thomas Adams, and Mr. Grenville Clark whether they appeared before the grand jury that found the present indictment in December, 1914, and all of them replied that they had not appeared and had given no testimony, and the only other persons who were present at the said examinations and who could testify to what was said thereat or identify the minutes thereof were the stenographer and referee, and they have denied that they have appeared before the grand jury who found the indictment, as more fully appears by the affidavit of Herbert A. Mossler, hereto annexed.

Wherefore, your deponent believes that no evidence whatever was given of testimony by deponent legally before the said grand jury.

Deponent further says that the statement in the last paragraph of the indictment to the effect that the said defendant, Oppenheimer, received payment of a certain note, deponent has asked all the persons who have knowledge of the same as to whether they appeared before the grand jury who found this indictment, and they have all stated to deponent that they have not appeared before the said grand jury,

and deponent believes, therefore, that there was no legal evidence of the payment of the said note to deponent before the grand jury.

Deponent further says that he is informed and believes that the only witnesses who appeared before the grand jury that found this indictment were alleged coconspirators and deponent believes that their testimony is insufficient on which to find an indictment for conspiracy, their declarations and acts or confessions being in law insufficient to establish the creation and existence of a conspiracy.

45 Deponent further says that one of the members of the said grand jury who found this indictment is a creditor of the Borough Apartment Realty Co., a corporation conducted entirely by the bankrupts, and referred to in the present indictment, in paragraph 4 thereof, as being part of the transferred and concealed assets and that the said person by reason of being a creditor of the said corporation alleged to be owned and directed by the bankrupts was an improper person to serve as a juror in this case, and deponent is informed and verily believes that the said person was present throughout the proceedings, took part in the deliberations and vote on the present indictment.

That the name of the said person is at present unknown to your deponent, but deponent can obtain the same through subpoenaing the members of the said grand jury and others who have refused to divulge the said juror's name or have forgotten the same.

HERMAN OPPENHEIMER.

Sworn to before me this 31st day of December, 1914.

J. CARL BECKER,
Com. of Deeds, New York City.

46 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA

against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM
SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER, AND
HERMAN H. OPPENHEIMER.

No. 7-278.

UNITED STATES OF AMERICA,

Southern District of New York,

State, city, and county of New York, ss:

Affidavit on motion to quash.

Herbert A. Mossler, being duly sworn, deposes and says:

That he is a clerk in the office of Herman H. Oppenheimer.

That during the month of December, 1914, he asked one Frank C. McCarrick, the stenographer referred to in the annexed affidavit of

Herman H. Oppenheimer, whether he had appeared before the grand jury of the United States District Court for the Southern District of New York, and the said Frank C. McCarrick told your deponent that he had not appeared before the said grand jury during the said month.

Deponent then asked said McCarrick to make an affidavit to that effect, but said McCarrick refused to do so, stating that he did not wish to be connected with the matter.

Deponent also asked Mr. Macgrane Coxé, the referee in charge of the proceedings of Abraham & Lesser, whether he had testified before the grand jury of this court during the month of December, 1914, and Mr. Coxé said he had not appeared or testified, and
47 deponent then asked whether the said referee would make an affidavit to the same, and said referee, Macgrane Coxé, replied that deponent could make his affidavit to the said effect.

HERBERT A. MOSSLER.

Sworn to before me this 31st day of December, 1914.

J. CARL BECKER,

Com. of Deeds, New York City.

(Indorsed:) Received Jan. 4, 1915. H. Snowden Marshall, U. S. Attorney. U. S. District Court, S. D. of N. Y. Filed Jan. 4, 1915.

48

Additional affidavit on motion to quash.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA,

against

JACQUES SAMUELS, HERMAN H. OPPENHEIMER,
et al.

No. 7-278.

Affidavit.

UNITED STATES OF AMERICA,

Southern District of New York,

State, City, and County of New York, ss:

Herbert A. Mossler, being duly sworn, deposes and says:

That he is a clerk in the office of Herman H. Oppenheimer.

That on the 13th day of January, 1915, he was informed by Honorable Macgrane Coxé, referee in charge of the case of Joseph Samuels & Co., and the referee who was present at the taking of the examination of Herman H. Oppenheimer, which is more fully referred to in the indictment in this court, numbered 7-278, that the said referee had at no time issued any duly authenticated copies of the testimony taken at the examination of the said Herman H. Oppenheimer on January 19, 1914, nor had he issued any certified copies or other copies of it with the certificate of its correctness.

Your deponent made inquiry of said referee and his clerks and the stenographer whether any legally certified copies of the said record had been issued and was informed that there was never any issued.

The said referee is the person who has charge of said record
49 and the only person who can legally certify the same.

HERBERT A. MOSSLER.

Sworn to before me this 12th day of January, 1915.

J. CARL BECKER,
Com. of Deeds, N. Y. City.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 4, 1916.

50 *Exhibit submitted part of motion to quash.*

United States District Court, Southern District of New York.

IN THE MATTER OF JACQUES SAMUELS AND BENJAMIN LESSER, INDIVIDUALLY AND AS COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ABRAHAMS & LESSER, BANKRUPT.

Before Macgrane Cox, Esq., referee in bankruptcy.

NEW YORK, *January 19th, 1914, 2 p. m.*

Hearing on application for allowance to the attorney for the bankrupt. Appearances: Grenville Clark, Esq., attorney for creditors; Herman H. Oppenheimer, Esq., attorney for the bankrupt; Thomas D. Adams, Esq., attorney for creditor; Herman Heidelberg, Esq., representing the Security Bank, and creditor in person.

The application for an allowance to the attorney for the bankrupt and also affidavit of due notice of this meeting are on file.

51 **THE REFEREE.** This is an application for an allowance to the attorney for the bankrupt for services and for disbursements. Counsel, of course, is entitled to some allowance. The statute and the rules of this district have limited the amount somewhat, and the rules provide that creditors should be notified of such applications. Does any creditor desire to be heard on the subject?

Mr. CLARK. I appear for the Lincoln Trust Company, your honor, in opposition to the application for allowance, and I would like the privilege of asking Mr. Oppenheimer some questions about his petition.

HERMAN H. OPPENHEIMER, the petitioner, being duly sworn, testifies as follows:

Examined by Mr. CLARK:

Q. When were you first employed by the firm of Joseph Samuels & Company, Mr. Oppenheimer?

A. You mean the Samuels & Lesser concern, now, in which the allowance is being made, or Joseph Samuels & Company, as you say?

Q. Abrahams & Lesser?

A. In the bankruptcy proceedings, you mean?

Q. At any time.

A. The first time about April 25th, 1912.

52 Q. And have you received any payment from the firm of Abrahams & Lesser or from Jacques Samuels or Benjamin Lesser, in contemplation of bankruptcy proceedings?

A. No.

Q. You did receive certain payments from the firm of Joseph Samuels & Company at the end of July, 1912, did you not?

A. Yes.

Q. How much was that?

A. About \$1,200.

Q. And the date?

A. But that had nothing to do with the bankruptcy proceedings. The date, I don't know exactly. It was in July. You had the date from the check book.

Q. The latter part of July?

A. Yes, sir.

Q. You say those payments were made on account of prior services?

A. Yes.

Q. Now you state somewhere in your petition that you had received no compensation whatever for the work referred to in your petition. Do you mean that you have received no compensation whatever from the bankrupt firm, or from either of its members, either before or since bankruptcy?

A. Yes.

Q. That you have received no payment of any kind, or in any form, since the bankruptcy for the work which you have done?

A. Yes; that is correct.

Q. By payment of money, or transfer of property, or in any other manner?

53 A. Yes; in the matter of Abrahams & Lesser.

Q. Or in the matter of Joseph Samuels & Company?

A. Oh, that has nothing to do with this.

Q. Well, have you received any?

A. I have not received any money or any property. I have received an agreement to be paid compensation besides what I will get in the matter of Joseph Samuels & Company, but not in the Abrahams & Lesser matter.

Q. Have you received any compensation for services rendered in the Samuels bankruptcy?

A. No.

Q. In any form or manner?

A. Well, just as I explained to you, an agreement to be paid a fee outside of what I get from the bankruptcy estate.

Q. And what is that agreement?

A. Well, I object to that. It is not relevant here, I submit to the court, an agreement in the Joseph Samuels & Company matter, to be paid a fee from my client outside of bankruptcy, and without reference to what I was to get from the estate.

Mr. CLARK. I will waive that question for the moment, your honor.

Q. Now I want to take up with you the separate paragraphs of your petition. You state in paragraph 2 "There have been about twenty examinations of the bankrupts and others before Commissioner Gilchrist and the referee herein." Do you not know as a matter of fact that there have been no examinations whatever of the bankrupts and others in this proceeding?

A. No; I do not. I thought the examinations that took place before Mr. Gilchrist were entitled in both these matters.

Q. And if the record shows, and the fact is, that the examinations here held in the Samuels & Company bankruptcy, you would abide by that record?

A. I would say that the facts gone into were the facts concerning this case here to a great extent, yes, and it was so treated by us as sort of a joint examination, because there were some twenty in the combined thing in the two matters.

Q. And you say in paragraph 2 that "there have been about thirty adjournments of various meetings had with your deponent after consultations with the attorneys for the receiver," and so forth. Those adjournments refer also to proceedings in the Samuels & Company bankruptcy?

A. No; they refer to proceedings before the referee in the Abrahams & Lesser matter, and also before the court in the various matters which were involved in Abrahams & Lesser.

Q. You are aware, of course, that these two estates must be separately administered, that their funds are separate, and that payment for services rendered in the Samuels bankruptcy should not be made out of the funds of Abrahams & Lesser, are you not?

A. So far as possible I think the court will administer them in that way, and I have tried to keep them separate, as far as possible. They are so interwoven that it is impossible to keep them absolutely separate, one member of the firm of Joseph Samuels & Company being a member of the firm of Abrahams & Lesser.

Q. In paragraph 3 you state that "there have been at least fifty consultations with each of the bankrupts in going over their affairs." Do you mean by that that you have consulted at least fifty times with Benjamin Lesser?

A. No; with Benjamin Lesser probably fifteen times; with Jacques Samuels probably three hundred times; so I say thirty-five of them were in reference to the matters regarding Abrahams & Lesser.

Q. In paragraph 4 you say "there have been at least two hundred telephonic communications with creditors or their attorneys," and so forth, and that "you have attended at the office of the referee and the United States District Court on a number of motions and proceedings and also at the office of the attorney for the receiver," and so forth, "where examinations were conducted." You are aware,

56 are you not, that those hearings were held under the title and actually in the Samuels bankruptcy proceeding?

A. No; they are chargeable, I think, as an attorney to both estates. It involved a question of a partnership in Abrahams & Lesser, the estate here in question, and I attended at Mr. Clark's office a large number of times in reference to that. Now, if the benefits are going to the creditors of Abrahams & Lesser, the benefits of these examinations—and I think there will be benefits—the estate of Abrahams & Lesser ought to pay for it to the estate of Joseph Samuels & Company, and it should be divided equitably between them.

Q. The object of those hearings were not to create any assets for the estate of Abrahams & Lesser, was it?

A. Yes; in some part it was. The object of those hearings being to recover about \$100,000 from a claimed partner, if Samuels & Company's claim is satisfied by that recovery, it will increase the amount of the estate of Abrahams & Lesser, or reduce the amount of the claims against the estate of Abrahams & Lesser by that extent, at least \$100,000 or \$70,000, whatever you settle it for.

Q. You are aware, are you not, that the endeavor was to create a cause of action in favor of the Samuels estate alone?

A. Which would reduce the Samuels claim against Abrahams & Lesser, Mr. Clark, and thereby increase the rights of
57 each creditor of Abrahams & Lesser and the assets in the estate of Abrahams & Lesser.

Q. It would not in fact affect the liability of the other partner of Abrahams & Lesser, would it, or reduce the claim against the Abrahams & Lesser estate in any way?

A. Absolutely. The claim filed by the trustee of Joseph Samuels & Company against the estate of Abrahams & Lesser would have to be wiped out.

Q. Now in paragraph 6 you say that you have written a large number of letters, numbering about two hundred; that you have prepared schedules, which were not the ordinary schedules, for reasons which you specify, and so on. Now is it true that you wrote two hundred letters concerning the affairs of this estate?

A. I say about two hundred. It may have been about three hundred. I have written to any number of creditors and attorneys in reference to this matter a number of times.

Q. Those letters also related to the affairs of Samuels & Company?

A. No; in speaking of the letters now it would be in reference to the estate of Abrahams & Lesser more particularly, although many of the creditors are also creditors of both estates, and they might inquire in one or the other.

58 Q. And you would be willing to produce those letters, I presume?

A. Those that I have copies of. I don't keep copies of everything and every letter or telephonic communication of that kind.

Q. Do you know if you have copies of the letters which you wrote in connection with this estate?

A. No; I don't think so. I just said I didn't keep copies of letters of that kind.

Q. But you would remember to whom those were written of which you do not have copies?

A. I probably could find that out; yes, I keep a letter book, and I could probably find out.

Q. In paragraph 7 you state that you "had to draw up a mass of legal papers in addition to those necessary for the purpose of attempting to effect a settlement herein and to follow them up by attendance in court and elsewhere." Now will you specify what those papers were?

A. Yes. If you want a statement, I will make a statement up for you in detail. I can't give it to you all now.

Q. As a matter of fact, haven't the legal proceedings in the Abrahams & Lesser estate as distinct from the Joseph Samuels & Company estate been very few?

59 A. At least entirely separate, yes; but, as I say, the same thing applies here; they are both so interwoven with each other.

Q. So when you refer to the mass of legal papers, you would say including papers which contained the Samuels & Company matter?

A. Not all of them; part of them, yes; where they refer to the Abrahams & Lesser matter.

Q. And you are making claim out of this estate for drawing papers in the Samuels matter?

A. I want to have it separate where it is possible.

Q. And of course it must be with regard to legal papers aside from those in the composition?

A. Well, I don't think so in each case.

Q. Well, you will submit copies of the papers which you have drawn in connection with the Abrahams & Lesser estate, will you?

A. Yes.

Q. In paragraph 9 you state that to set forth the work done herein in detail would take at least forty or fifty pages, and as a great part of it consisted in attention to legal matters appearing before the referee and the court, you refer to the records of the referee and the court, and you will be willing to abide by the records of the referee and the court in the Abrahams & Lesser bankruptcy to show what matters you attended to?

A. And the matters in the Joseph Samuels & Company case
60 where they are so connected that the charge ought to be against the Abrahams & Lesser estate.

Q. And the only way in which they were connected was in the composition proceedings; isn't that so?

A. No. As I said before, they were seriously connected in these ten or twenty hearings at your office, and any number of adjournments, where we were trying to recover this large sum for the creditors, and in the examinations in reference to the Cohen matter, where there was about \$15,000 collected, where I was informing and assisting the trustee all through those examinations.

Q. And you wish to be understood as saying that there were ten to twenty hearings at my office in connection with where testimony was taken?

A. In my opinion, there must have been at least ten meetings, either at your office or at the referee's office, from where it was adjourned, or at Mr. Dittenhoefer's office—I mean in the Valentine matter. There were at least ten, in my opinion, and I think more than that, examinations that I attended.

Q. In paragraph ten you refer to proceedings you took to disallow or reduce certain claims, took testimony, etc. There you would, of course, be willing to abide by the record in this office to show just what was done?

A. If the record shows my name as appearing. I believe I
61 appeared there for the trustee, and if I appeared for the trustee my name may not have been put in the record, but I conducted the entire proceedings to reduce or strike out the claims from the files, and also in the special examination does not appear, but I conducted the first half dozen examinations, I think, and then Mr. Clark and I took it up.

Q. You conducted the examinations of all the witnesses except Valentine and Fox, as I recollect it?

A. I didn't even know that Valentine and Fox had been examined. I wasn't at those examinations, and didn't take part in them.

Q. And all other examinations you conducted?

A. One examination of Valentine I was at, but it wasn't in this proceeding direct, and in the other examinations, you conducted

them, and I conducted a number of them. I assisted the trustee in getting the facts.

Q. You asked the questions?

A. I asked the questions, and went over the testimony with the witnesses, so they would be able to assist the trustee in a proper manner.

Q. Now, you took proceedings to reduce claims in the Samuels & Company bankruptcy, did you not?

A. Yes, sir.

Q. Most of the claims that you took proceedings to reduce were against the Samuels estate?

A. Some of them were against both estates.

62 Q. In paragraph 11, you state that you have "examined the claims filed herein, numbering over one hundred and fifty, and gone over same carefully for the purpose of informing the trustee," and so forth. There you would, of course, abide by the records of this office and the claim book with regard to the accuracy of that statement?

A. Oh, no; they wouldn't have a statement here that I examined the claims, but I was here ten or fifteen times, and not once.

Q. With regard to the accuracy of the number of claims stated by you?

A. In regard to the number of claims filed, of course the records of the referee is absolutely controlling, and I did not mean to say any more than that, if there are any more; but I think, as I recall, there were nearly that many claims.

Q. Did you look it up before you verified the petition?

A. I depended upon my memory to a great extent.

Q. And the same applies, in general, to the statement of about what you did in this estate?

A. In general, yes; it is a general petition, because I thought to draw forty or fifty pages, and give each one in detail would be a waste of time.

Q. But I am asking you what means you took to get the information on which you made the petition?

63 A. I either personally attended to these matters or directed others in their attention to it.

Q. But did you look up any records in regard to getting the information on which you base this petition?

A. Any records in the referee's office or the court, I would say no. I depend on the papers in my office, to a great extent.

Q. And your recollection?

A. And my recollection.

Q. And you gave your best recollection, I suppose?

A. Yes.

Q. Paragraph 12 you say that you "obtained orders from the district court for stays and various actions and proceedings brought against the bankrupts." Will you specify in what instances you did that?

A. Well, I will give you a complete statement if you want me to. I have one or two of them here with me. There is the case of Abraham H. Blank against Barney J. Abrahams, and there were probably, I should say, at least five, and maybe eight or nine actions commenced against the various parties which were stayed on my application. One of them at least was contested.

Q. And you will furnish a list of those?

A. Yes.

Q. And you will, of course, abide by the records of the district court as to the cases in which you obtained stays?

A. Certainly.

64 Q. In paragraph 14 you state that you have spent at least two full weeks in going over the books of the bankrupt with accountants and others, for the purpose of ascertaining the true condition, and in order to explain the difference in the assets as shown at the time of the failure and various statements given by the bankrupt, and you spent thirty other days in this work, for reasons which you state. Did you spend two weeks in going over the books of Abrahams & Lesser with accountants?

A. Yes.

Q. And with whom?

A. The accountant in the matter, Mr. Nemerov and Mr. Schreier, another accountant, who had two interviews with me concerning it.

Q. Anybody else?

A. Well, only your accountant. I spoke to him several times in regard to the matter.

Q. Who is Mr. Schreier?

A. Another accountant of the firm of Schreier & Hecht, certified public accountants in this city.

Q. And that was in connection with the turnover proceedings?

A. No, that was in connection with the loss of moneys, in a general way, in the Abrahams & Lesser business, and to the financial statement made in that case, and arrive at the amount of merchandise, and so on.

Q. And to the financial statement made by Abrahams & Lesser?

65

A. Yes.

Q. What financial statement?

A. The financial statement made by Abrahams & Lesser on October 28th or 29th, or some date like that, in 1911, about which there has

been a mass of testimony taken—how it was made up, when it was made up and so forth.

Q. You mean taken in the turnover proceedings?

A. In the turnover proceedings, in the examination under section 21, and in the examinations before the referee, and in the private proceeding.

Q. When did you put in the two accountants to go over the books of Abrahams & Lesser?

A. At various times; started in just before the bankruptcy, within about five days before the bankruptcy at a time the bankers and Samuels were having conferences. No, it was even within more days before that, at the time Mr. Valentine was to raise money to keep this business going.

Q. When was that?

A. Around July 20th.

Q. You had interviews with him then?

A. Who?

Q. Valentine?

A. Yes, I had interviews with Valentine with reference to keeping the business going since July 1, should say the 10th, the week before the Rosenthal murder.

66 Q. And during that week you were going over the books of Abrahams & Lesser with accountants, were you?

A. I wasn't all during that period. I had spoken to the accountants and went over general facts necessary for the purposes then under discussion. I got, for instance, a statement of the account with Valentine, had that made up, and explained exactly what I wanted to know about it.

Q. During July, 1912?

A. During July, 1912.

Q. Beginning about July 10th?

A. Yes.

Q. And did you ascertain the true condition?

A. Of what? Of the affairs of Abrahams & Lesser?

Q. Yes.

A. So far as I was able to, I think I did.

Q. What was it?

A. Their financial condition?

Q. Yes.

A. That they owed for merchandise about \$30,000; that they had obtained from Joseph Samuels & Company, or Jacques Samuels, the sum of about \$85,000 or \$90,000 more; and that their assets consisted of stock, machinery, outstanding accounts, which had cost them in the neighborhood of \$70,000 or \$80,000.

Q. So you found them solvent?

A. No; solvent if you take out the claim of Jacques Samuels for the money he had advanced to them.

Q. And when was that, that you found they were not solvent?

A. I found the condition I have just explained to you
67 between the 15th and 20th of July, 1912. I don't say that they were not solvent from their standpoint; Mr. Samuels being a member of that firm, if you take that account out, I believed them to be solvent and could have continued.

Q. Now did you examine the books of Samuels & Company in the same way? You say the affairs of the two concerns were intermingled?

A. I examined the books of Samuels & Company twice before the bankruptcy, once in the summer time, in July, I assume—I can't fix the date, except it was a warm day—and then again on the Thursday, Friday, and Saturday before the petition was filed. I want to say there four times, not twice, before the petition was filed.

Q. What was the first time again?

A. I think early in July, it must have been.

Q. Did you have any assistance?

A. Any assistance? I had the assistance of Mr. Jacques Samuels, Mr. Nemerov, and Mr. Siegel. And when I say examined there, I didn't mean to say that I sat down for four or five days and went over the details of those books. I examined the method of bookkeeping, and then asked various questions, which I asked them to take up for me.

Q. And what did you find their condition to be?

A. I found their condition to be, from the books, that they
68 owed also about \$33,000 for merchandise and about \$30,000 to banks, and that they had an immense liability as endorsers, a possible liability, against which they had as assets the original or primary liability of the makers of various notes and papers of various kinds, which they figured as absolutely good. Under those circumstances, I figured the same as they did, Mr. Samuels having repeatedly expressed that all these people would not hurt a hair of his head, meaning that they would pay up every dollar they owed as primarily liable, and I figured them as good, the same as the bankers, their individual creditors did, when they took them. I also counted on that in figuring later that way. And then their assets, on the other hand, consisted of a plant which they showed was worth over \$75,000, and outstanding accounts of about \$25,000, and the stock of goods, wares, and merchandise, and such things that cost them another \$50,000. I figured them as absolutely solvent by more than \$100,000 if these original people who had made out their notes and papers and given them to them, would pay.

Q. Did you verify their assets?

A. To a limited extent merely, by asking general questions, "What is your machinery account, and what is your merchandise account, and what are your outstanding accounts"? and such things. I didn't go through them. I never was in their factory but once prior to that.

Q. Had you rendered legal services to them before the month of July, 1912?

A. Joseph Samuels & Company?

Q. Yes.

A. Not for three years previous.

Q. When were you first consulted by them in 1912, or by any of the members of the firm?

A. Well, you mean in reference to the business of Joseph Samuels & Company?

Q. Well, I ask the general question.

A. I told you before. Mr. Jacques Samuels consulted with me about the affairs of his sister and one of the alleged partners of the business in the month of April, 1912. Previous to that, and from the month of January I should say, I had met Mr. Samuels half a dozen times socially, and he had told me that he was coming to my office to speak to me about something, but he never came, and he always told me he wanted to send down a lot of papers for me to look over. They proved afterwards to be these Valentine papers in this Valentine affair when he eventually came in June.

Q. At the time of the efforts to obtain money from Valentine, was there any intimation that the firm was in trouble?

A. No. Mr. Valentine as well as ourselves all figured that those notes that Valentine, vice-president of the Columbia Bank, and all the bankers held, were good. We had no reason at that time to believe differently. It was only after the Rosenthal murder, and this man Cohen demanded \$15,000 or Samuels life, that they gave up the \$15,000, that then the full extent of the liability on these endorsements became known.

Q. When was that?

A. About July 15th or the 20th. Up to that time we were figuring on positively keeping the business going, and Mr. Fox, the president of the Columbia Bank was about to assist.

Q. So there was a time I suppose in there that it became apparent that the thing was going to break up?

A. After the 20th.

Q. And after the 20th you accepted payment of \$1,235 from the bankrupt?

A. For the services I had rendered to the sister at the request of Jacques Samuels. After the close, no. I think I was paid before the 20th, before I knew of the insolvent condition.

Q. Have you a copy of the bill for which you were paid the \$1,200?

A. It must be in the office.

Q. And you will produce it?

A. Yes; I guess so, if you want it.

Q. Did you look at the notes which the bankrupts had
71 among their assets; that is, Joseph Samuels & Company?

A. No; I did not.

Q. In paragraph 15 you state that you appeared at the sale of the assets, and assisted the trustee in obtaining as large a price as possible, and spent a whole day at the sale, and previous thereto you had appeared at the private sale; that you had interviews, and had written letters and spoken to various persons in order to get large bids. Do you know who bought the property?

A. Yes—now let me go back to the last question, on the notes. While I didn't see any notes, I was given a general statement of it, not the details as to each. That statement was given to me first around the beginning of July, and the total of it was given to me as not more than \$60,000 or \$70,000 of all the people concerned. The true facts as to the amount of those notes came out a few days before the filing of the petition, about the 27th, 28th, or 30th of July, just before the filing of the petition, when we had a meeting up in Mr. Webb's office, the trustee, and it then came out that this mass of notes was among the banks. Mr. Samuels never counted it as a liability, and never mentioned it at all.

Q. And then you realized that he would have to make good on those notes, I suppose?

72 A. No; I had the promise of one of the makers of those notes in my office even the week previous to that, that Mr. Jacques Samuels, or Samuels & Company, or these firms would never lose a dollar of that money; that they had assets to pay, and the other one, Dietz, was supposed at that time to have had an immense amount of assets with which to pay also.

Q. Did you find in your examination of the affairs of the bankrupts either firm, Samuels & Company, or Abrahams & Lesser, prior to the bankruptcy, anything to lead you to believe that any assets had been concealed, or that any of their assets were not what they were represented to be, and apparently were?

A. I don't fully appreciate your question. Did I find any assets concealed? I would say to that, no.

Q. Did you find that any of the assets were not what they appeared to be? I refer particularly to the notes which are now in the trustee's hands?

A. Within three days of the bankruptcy, yes. Then I asked that I be given the pawn tickets which I had assumed for two weeks were in the possession of Mr. Samuels, pawn tickets of Mr. Dietz' in which

he was supposed to have an equity of over \$100,000. I then found that he never had them in his possession.

Q. Who bought in the assets at the public sale?

A. I think about fifty or sixty purchasers.

73 Q. Who bought in the plant?

A. I don't know that, Mr. Clark; some dress and waist manufacturer whose name I can get if you want me to, but he had no connection whatever with Mr. Lesser or Mr. Samuels, that I know of.

Q. Have you received from Joseph Samuels & Company, or from Jacques Samuels, or any member of his family, any transfer of property, any mortgage or other interest in property now held by them since the bankruptcy?

A. Not as payment for the fees in the Abrahams & Lesser matter, nor with any other understanding except that what fees are to be paid to me by the estate, that the agreement they gave me should be in addition to those fees.

Q. What is that agreement, a mortgage?

A. No. I didn't receive that from Samuels. I received that from Mr. Rosenthal, one of the creditors here, participation in a chattel mortgage, in which I am to be paid some fees starting December, 1914.

Q. And how much are those fees?

A. Well, I object to that, I don't think that is relevant or material. It is not in this matter, and it is in another matter, and when I apply for any allowance in that matter it may be relevant.

74 Q. But you have said the assets are intermingled, and it appears, does it not, that some of the matters which you mention in this petition are services rendered for the Samuels estate?

A. Yes, but I don't want any pay for the work rendered to the Samuels estate in this proceeding, now. If I ever make any other application, I shall disclose exactly what arrangements have been made for future payment, if I get any.

Q. Do you intend to make such an application?

A. I intend to place such an application on file, and disclose to the court what has been done to promise me some fees in the far distant future. This is not a first chattel mortgage, by any means. I come in above, and far and beyond the amount that Mr. Rosenthal paid for this property at the sale of the Samuels estate. He paid about \$15,000 for the plant, and I start in getting a share of it after about \$20,000 has been repaid to him.

Q. And you wish to be understood as testifying that you have not received since the bankruptcy any cash from any of the bankrupts or their family, as compensation for legal services.

A. Positively.

Q. Are you a relative of the bankrupts?

A. No; a nephew of one of the bankrupts married my niece.

75 Mr. Oppenheimer states that he has an engagement before Judge Mayer at 3 o'clock.

Mr. Clark states that he has some more questions to ask of Mr. Oppenheimer, and states that Mr. Oppenheimer is to produce certain statements, and asks that the hearing be adjourned.

Adjourned by consent to Friday, January 23, 1914, at 11.15 a. m.

76 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,	} No. 7-278.
vs.	
HERMAN H. OPPENHEIMER ET AL., DEFENDANTS.	

Notice of motion.

SIRS: Please take notice that a motion will be made before the United States District Court for the Southern District of New York, in the United States courthouse & post-office building, at the term thereof for the hearing of criminal business, on Monday, the 25th day of January, 1915, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

1. That the defendant, Herman H. Oppenheimer, be directed to elect which of the documents filed herein, entitled as follows:

- a. "Demurrer,"
- b. "Plea in abatement,"
- c. "Motion to quash on behalf of Herman H. Oppenheimer,"
- d. "Plea in bar,"

he stands on in this case, and that the other of said documents be stricken from the records of this court until the adjudication on the document on which said defendant may elect to stand.

2. That the document entitled "Plea in abatement" be
77 stricken from the records of this court on the ground that the defendant has filed a demurrer to the indictment herein and thus waived any defect which might be taken advantage of by a plea in abatement.

3. That the document entitled "Plea in abatement" filed herein be stricken from the records on the ground that it is not properly verified as required by law.

4. For such other and further relief in the premises as may be just and proper.

Yours, etc.

Dated New York, Jan. 21, 1915.

H. SNOWDEN MARSHALL,
United States Attorney, Attorney for the Plaintiff.

Office & post-office address: U. S. Court House & Post Office Building, Borough of Manhattan, City of New York.

To Messrs. Kellogg & Rose, attorneys for Defendant Oppenheimer, 115 Broadway, Borough of Manhattan, City of New York.

78 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,	} 7-237.
vs.	
HERMAN H. OPPENHEIMER ET AL., DEFENDANTS.	

Notice of motion.

SIR: Please take notice that upon the annexed affidavit of Samuel Hershenstein, duly verified on January 8, 1915, a motion will be made before the United States District Court, Southern District of New York, in the United States courthouse and post-office building, at the term thereof for the hearing of criminal business, on Wednesday, the 13th day of January, nineteen hundred and fifteen, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to strike from the records of this court certain documents filed herein, entitled as follows: (1) "Demurrer"; (2) "Plea in abatement"; (3) "Motion to quash on behalf of Herman H. Oppenheimer"; (4) "Plea in bar," on the ground that at the time said documents were filed the plea of "not guilty" theretofore entered by the defendant, Herman H. Oppenheimer, was not withdrawn and said plea of "not guilty" still remains of record in this court.

Yours, etc.

Dated New York, January 8th, 1915.

H. SNOWDEN MARSHALL,
*United States Attorney for the Southern District
of New York, Attorney for the Plaintiff.*

To Kellogg & Rose, attorneys for the Defendant Oppenheimer, 115 Broadway, New York City.

79 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,	} No. 7-237.
vs.	
HERMAN H. OPPENHEIMER ET AL., DEFENDANTS.	

Affidavit.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York,

Samuel Hershenstein, being duly sworn, deposes and says that he is an assistant United States attorney for the Southern District of New York; that on December 21st, 1914, the United States grand

jury for the Southern District of New York duly filed in this court an indictment charging the above-named defendant, Herman H. Oppenheimer, and others, with a violation of section 37 of the United States Criminal Code; that on December 22d, 1914, the said defendant, Herman H. Oppenheimer, appeared in court and pleaded to said indictment "not guilty" with leave to withdraw said plea by January 4, 1915, and demur or make any other plea or motion he may be advised on said date;

That on January 4th, 1915, the said Herman H. Oppenheimer did not withdraw said plea of "not guilty," but placed on file in said court four documents entitled as follows: (1) "Demurrer;" (2) "Plea in Abatement;" (3) "Motion to Quash on Behalf of Herman H. Oppenheimer;" (4) "Plea in Bar;" that the plea of "not guilty" still remains upon the records of this court, as well as the
80 other documents above referred to.

SAMUEL HERSHENSTEIN.

Sworn to before me this 8th day of January, 1915.

[SEAL.]

FREDERICK L. CAMPBELL,
Notary Public, Kings County, No. 127.

Certificate filed in New York County, No. 61, New York County.
Register's No. 6164, New York County.
Register's No. 6173, Kings County.
My commission expires March 30, 1915.

(Endorsed:) Copy received Jan. 8, 1915. Kellogg & Rose. Filed Jan. 21, 1915.

81 *Criminal docket 7-278—Docket entries.*

UNITED STATES

vs.

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER, AND HERMAN H. OPPENHEIMER.

H. Snowden Marshall, U. S. attorney.
Kellogg & Rose, 115 B'way, for Def't Oppenheimer.
Joseph I. Green, 141 B'way.
Conspiracy to conceal assets from trustee in bankruptcy.
Sec. 37, U. S. C. C., and sec. 29-b, bankruptcy act.
1914.

Dec. 21. Filed indictment.

Dec. 22. Def't Herman H. Oppenheimer pleads not guilty. Bail, \$500.

Dec. 22. Filed recognizance of Oppenheimer.

1915.

- Jan. 4. Def't Dietz pleads not guilty. Bail, \$2,500.
 Jan. 4. Filed motion to quash, plea in abatement, plea in bar, and demurrer as to Herman H. Oppenheimer.
 Jan. 6. Filed demurrer and motion to quash, and special plea in bar as to H. J. Dietz.
 Jan. 5. Filed recognizance of Dietz.
 Jan. 20. Def't H. J. Dietz withdraws plea of not guilty.
 Jan. 21. Def't H. H. Oppenheimer withdraws plea of not guilty.
 Jan. 21. Filed notice of motion.
 Jan. 30. Demurrers and motion to quash argued—Judge Pope.
 Jan. 30. Pleas in bar and pleas in abatement withdrawn from the record without prejudice to refile after decision on demurrer.
 Jan. 30. Filed joinder in demurrer.

1916.

- Feb. 2. Filed opinion, Pope, J. Indictment ordered quashed and allowing defendants to go without day thereunder.
 Feb. 14. Filed amended opinion, Pope, J.
 Feb. 26. Filed order granting motion to quash made by defendant Herman H. Oppenheimer. (A. N. Hand, J.)
 Feb. 26. Filed assignment of errors, petition for writ of error.
 Feb. 28. Filed citation and writ of error, U. S. Supreme Court.
 M'ch 9. Stip. as to record.

82

Opinion.

District Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA
 vs.
 JACQUES SAMUELS ET ALS.

Nos. 2461-2462.

R. B. Woods, Esq., of New York City, assistant district attorney for the United States.

Abram J. Rose, Esq., Emanuel Jacobus, Esq., and Benjamin Slade, Esq., all of New York City, for defendants.

THOMAS, *District Judge:*

The defendant and nine others were jointly indicted by the grand jury on February 24th, 1914, charged with a conspiracy to conceal assets from a trustee in bankruptcy in violation of sec. 29b of the Bankruptcy Act and with violating sec. 37 of the United States Criminal Code.

Four of the defendants, Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, are represented by counsel and pleadings bearing various titles have been filed in their behalf. Each of these four last mentioned defendants in his pleadings asks

that the indictment, so far as it relates to him, be quashed for the reason that the acts alleged in the indictment are barred by the statute of limitations contained in section 29d of the Bankruptcy Act. Said section reads as follows:

"A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense."

83 In my opinion the above quoted section is determinative of the issues presented by the indictment against the aforementioned defendants who have, in their pleadings, attacking the indictment, invoked the provision of said section, hence there is no occasion to determine other questions raised by pleadings, some of which are of vital importance and decisive.

As already noted, the indictment was returned February 24th, 1914. The last overt act alleged in the indictment was on November 25th, 1912.

There are no other facts alleged in the indictment which would warrant this court in finding a continuous act of conspiracy from November 25th, 1912, to the date of the indictment, February 24th, 1914.

While it may be inferred from the language of the indictment that the *concealment* continued, no facts are alleged to show the continuance of the conspiracy, if one existed.

In *United States vs. Phillips*, 196 Fed., 574, Judge Hough of this district, after carefully analyzing the cases of *U. S. v. Kissel*, 218 U. S., 601 and *U. S. v. Irwins*, 98 U. S., 450, arrived at this conclusion; that while the concealment may continue the crime of concealment was completed long before.

In the case of *In re Adams*, 171 Fed., 599, it is held that concealment must be from "a trustee." In the case at bar the indictment alleges that the trustee qualified on November 4th, 1912. The last overt act alleged in the indictment was twenty-one days later, to wit, on November 25th, 1912.

84 It is therefore apparent from the language of the indictment that more than one year elapsed after the appointment of the trustee and after the date of the last overt act alleged therein before this indictment was found or filed in court against these defendants.

If the statute of limitation provided for in the bankruptcy act, section 29d is controlling, then these indictments should be dismissed as against the four defendants invoking the protection of that statute.

I find nothing in the language of these indictments that warrants a conclusion other than that the offenses therein described were offenses against the bankruptcy act and as such should be dealt with according to the plain provisions of that act, one of which, section 29d,

is a statute of limitation which effectually bars a prosecution of these defendants invoking its protection. The learned district attorney contended that the limitation contained in section 29d does not apply and claimed that the limitation imposed in sec. 1044 of the Revised Statutes should govern. I can not subscribe to this contention. In the absence of section 29 of the bankruptcy act this court would have no jurisdiction over the alleged crime set forth in the indictment. If Congress intended that section 29d should apply only to the offenses specifically enumerated in the entire section appropriate language, in my opinion, would have been adopted. For example, if subdivision 29d read "a person shall not be prosecuted for any of the foregoing offenses," etc., then the Government's claim would have some force, but the subdivision in question reads in part "for any offense arising under this act." The alleged offense recited in the indictments necessarily arose out of the bankruptcy act and not under some other law of the United States, hence the limitation found in section 29d applies.

85 I therefore find that no lawful indictments were found against Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, or either of them within one year after the offenses alleged in the indictments, and that their prosecution is barred by section 29d of the bankruptcy act. These indictments are therefore dismissed as to each and all of them.

Let an order to that effect be entered.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 1, 1914.

86

Opinion.

In the United States District Court for the Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,

v.

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER, AND HERMAN H. OPPENHEIMER, DEFENDANTS.

No. 7-278.

Opinion.

The demurrer and the motion to quash filed by the several defendants proceed upon a number of grounds. All of these have been carefully examined.

The attack upon the regularity of the proceedings before the grand jury is found not to be well taken. Even if lack of evidence before a grand jury to justify the finding of an indictment constitutes grounds for quashing it, the showing in support of the motion to quash is inadequate to show a lack or such evidence. None of the other grounds

connected with the hearing before the grand jury are, in the light of well-settled principles, sufficient to sustain the motion to quash.

Other features of the attack upon the indictment go to portions thereof rather than the entire instrument, and for that reason can not be considered.

The only ground which impresses the court as serious as against the validity of the present indictment arises out of the following state of facts:

An indictment was found against these same defendants on February 24, 1914, which, in legal effect, is identical with the indictment here under consideration. This latter statement is made advisedly notwithstanding the fact that the present indictment, found December 21, 1914, contains an alleged overt act in addition to those set forth in the indictment of February 24th. In other respects the indictments are practically identical. An examination of the additional overt act alleged in the last indictment leads to the view that, notwithstanding certain conclusions of law therein set forth, the matters therein stated cannot, from their nature, constitute an overt act under the conspiracy alleged in each of the indictments. It follows, therefore, as stated above, that the two indictments are legally identical.

With this as a premise, the disposition made of the first indictment is material. The sufficiency of that was before Judge Thomas upon a motion to quash, and was decided by him on October 1, 1914. His decision (which of course was in advance of any submission to or swearing of a jury) quashed the indictment and discharged the defendants thereunder. This decision proceeded upon the ground that the prosecution was barred by the statute of limitations. No appeal was taken by the government from this decision, and thus from October 1, 1914, when the decision was rendered, until December 21, 1914, when this indictment was found, there was nothing pending against these defendants. Should the prosecution under this last indictment be allowed to proceed when there is outstanding a judgment in favor of the defendants to the effect that the statute of limitations has run against their alleged offense? The Government urges that this may be done, and further sets forth to the court the fact that since the decision of Judge Thomas a decision of the Circuit Court of Appeals for this Circuit, as well as a decision by the Supreme Court of the United States, has shown that the statute of limitations did not run until three years after the offense instead of one year as held by him, and that his decision was thus erroneous. This latter, however, does not impress me as being of relevancy, provided the defendants have heretofore been heard upon this issue, have been discharged thereunder, and that judgment being unappealed from remains in force and effect. The decision of Judge Thomas in

my judgment became the law of the case, and, until reversed, protected the defendants from further prosecution arising upon the same state of facts. While, of course, were the case open to decision upon the question of limitation, the decision of the appellate courts would control, yet the law of the case having been settled previous to these decisions, the defendants should not be subjected to another prosecution while the judgment quashing the indictment and discharging them still remains in force and effect. To hold otherwise is to subject the citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he should, until such decision is reversed, be allowed to go unmolested by another proceeding on the same charge.

An order will accordingly be entered quashing the indictment of December 21, 1914, and allowing the defendants to go without day thereunder.

This January 29, 1916.

WM. H. POPE,

U. S. District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 14, 1916.

89

Order quashing indictment.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, Herman J. Dietz, Charles Hepner, and Herman H. Oppenheimer, defendants.

No. 7-278.

A motion to quash the indictment herein having been filed by the defendant, Herman H. Oppenheimer, and having duly come on to be heard before the Honorable William H. Pope, district judge, on the 29th day of January, 1915;

Now, after reading the decision and opinion of Honorable William H. Pope, United States district judge, dated January 29th, 1916, and filed in the office of the clerk of the District Court of the United States for the Southern District of New York, on February 2d, 1916, and the amended opinion of said judge, it is

Ordered and adjudged, that the motion to quash made by the defendant, Herman H. Oppenheimer, be granted, and the indictment is hereby quashed and the defendants allowed to go without day thereunder.

Dated New York, February 26th, 1916.

AUGUSTUS N. HAND,

U. S. D. J.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 26, 1916.

90 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA

vs.

HERMAN H. OPPENHEIMER ET AL.

Assignment of errors.

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred in the decision of the court herein sustaining defendant's motion to quash the indictment herein:

I. The court erred in holding that the action of the court in quashing the former indictments Nos. 2461 and 2462 were a bar to a reindictment and prosecution upon a similar charge, although the defendant had not been put in jeopardy under said former indictments.

II. The court erred in describing its action as the granting of a motion to quash the indictment.

III. The court erred in not describing its action as the sustaining of a special plea in bar.

IV. The court erred in holding as a matter of law that the last overt act in the indictment herein could not from its nature and did not legally constitute an overt act under the conspiracy alleged in the indictment.

91 V. The court erred in not holding as a matter of law that the last overt act in the indictment herein did constitute an overt act under the conspiracy alleged in the indictment.

VI. The court erred in holding as a matter of law that the indictment herein is legally identical with the indictments returned, Nos. 2461 and 2462, which were dismissed by Judge Edwin F. Thomas, copies of which indictments and opinion are annexed hereto.

VII. The court erred in sustaining the motion to quash the indictment.

VIII. The court erred in not denying the motion to quash the indictment herein.

Wherefore the United States of America prays that the judgment of the said District Court of the United States for the Southern District of New York be, under the act of Congress approved March 2nd, 1907, reviewed by the Supreme Court of the United States and said judgment be reversed.

H. SNOWDEN MARSHALL,
*United States Attorney for the
Southern District of New York.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 26, 1916.

By the honorable Augustus N. Hand, one of the justices of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Herman H. Oppenheimer, et al., greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden in the city of Washington, in the District of Columbia, on the 26th day of March, 1916, pursuant to a writ of error filed in the clerk's office of the United States District Court for the Southern District of New York, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 26th day of February, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and fortieth.

AUGUSTUS N. HAND,

Judge of the district court of the United States for the Southern District of New York, in the Second Circuit.

93 (Indorsed.) C 7—278. U. S. District Court, Southern District of New York, United States of America *versus* Herman H. Oppenheimer, et al. Citation. H. Snowden Marshall, United States attorney, attorney for U. S. Service of a copy of the within is hereby admitted. New York, Feb. 28, 1916. Kellogg & Rose, attorney for defendants. To Messrs. Kellogg & Rose, attorney for defendants, 115 Broadway, New York, N. Y.

94 Supreme Court of the United States.

UNITED STATES, PLAINTIFF IN ERROR,	} No. 899.
vs.	
HERMAN H. OPPENHEIMER ET AL.	

Stipulation.

It is hereby stipulated by counsel for the respective parties in the above entitled and numbered cause, that the number 7-237, wherever it occurs on pages 14, 16, and 21, of the "Extracts from Transcript of Record," shall be changed before submission to read 7-278, which

is the correct number of the case in the United States District Court for the Southern District of New York.

JNO. W. DAVIS,
H

Solicitor General.

L. LAFLIN KELLOGG,
ABRAM J. ROSE,
HALL,

Attorneys for Herman H. Oppenheimer, Defendant in Error.

April 17, 1916.

97 In the Supreme Court of the United States, October Term, 1915.

(Indorsed:) File No. 25182. Supreme Court U. S. October term, 1915. Term No. 899. The United States, Pl'ff in Error, vs. Herman H. Oppenheimer et al. Stipulation to correct record. Filed April 17, 1916.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.

HERMAN H. OPPENHEIMER ET AL.

No. 899.

Stipulation.

It is hereby stipulated by counsel for the parties to the above entitled cause that the transcript of the record herein may be enlarged by adding thereto the annexed pleadings, which are true and correct copies of the originals filed in this cause in the United States District Court for the Southern District of New York:

(1) Plea in abatement, filed January 4, 1915, withdrawn January 30, 1915;

(2) Plea in bar which was filed January 4, 1915, and withdrawn January 30, 1915;

(3) Joinder in demurrer to indictment filed by the United States, January 30, 1915.

JNO. W. DAVIS,

Solicitor General.

ABRAM J. ROSE,

L. LAFLIN KELLOGG,

Attorneys for Defendant in Error.

98 United States District Court, southern district of New York.

THE UNITED STATES OF AMERICA

against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM
SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER
AND HERMAN H. OPPENHEIMER.

No. 7-237.

Plea in abatement.

And now comes the defendant, Herman H. Oppenheimer, and moves this court to set aside the indictment filed in this case for the following reasons:

1. It appears from the records of this court that the indictment herein is barred by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462. This indictment sets forth and is based on the same conspiracy as the last indictment, which last indictment is hereby made a part of this plea together with the opinion and order thereon now on file in this court.

2. And the said Herman H. Oppenheimer, in his proper person comes this 4th day of January, 1915, and, having read the said indictment and protesting that he is not guilty of the premises charged in said indictment, for plea, nevertheless, says that the United States of America ought not further to prosecute the said indictment against him because he says that at divers times during the sessions of the grand jury (during the month of December, 1914, and up to and including the 21st day of December, 1914), by which the said indictment was found and returned into this court, and whilst the said grand jury was engaged in the investigation
99 of the transactions, matters and things charged and set forth in said indictment, during said time, and during the examination of witnesses and the introduction and taking of oral testimony and documentary evidence concerning the same, and during the deliberations and vote thereon, the said grand jury which voted the said indictment was improperly constituted and the members thereof were not proper persons to pass on the said indictment, at least one of them being interested in the subject matter thereof, as a creditor of one of the corporations owned by the bankrupts, to wit, the Borough Apartment Realty Co., and the said juror was present while the witnesses were being heard, and, as defendant believes, during the deliberations and voted upon the said indictment, which fact was known to all of the said grand jurors who voted on the said indictment, in contravention to the statutes of the United States now in force in reference to qualifications of grand jurors and to the self-evident injury and harm of the defendant, Oppenheimer.

4. That the grand jury, when it voted this indictment had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment, against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment alleges that the defendant, Oppenheimer, gave certain false and willful testimony on January 19th, 1914, and there was no legal or competent evidence before the said grand jury that he had so testified, and there never was such testimony given by said defendant, Oppenheimer.

100 5. That the grand jury, when it voted this indictment, had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both, and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment charges the defendant, Oppenheimer, with having received payment of a note given to him by the bankrupt during September, 1912. There was no competent legal evidence before the said grand jury of the said fact.

6. That the grand jury, when it voted this indictment, had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against the defendant, Oppenheimer, and did not have competent legal evidence as to either or both, and the same more fully appears by the records of the said grand jury, and more particularly from the facts, that the said indictment charges that the defendant, Oppenheimer, conspired with various persons, and there was no competent legal evidence before the grand jury of the creation or existence of the said conspiracy.

Wherefore the said Herman H. Oppenheimer prays judgment of the said indictment whether the United States of America ought or can prosecute him in the premises, and that this indictment be quashed or dismissed and that he may be discharged thereof without delay, and the information contained herein has just been

101 obtained by the defendant only since the indictment, and this plea has not been filed earlier for the sole reason that on the date the indictment was found the time to file pleas other than that of not guilty was fixed by the court to be the date this plea is filed.

New York, January 4th, 1915.

KELLOGG & ROSE,
Attorneys for defendant, Oppenheimer,
O. & P. O. Address, 115 Broadway, Manhattan, New York City.

ABRAM J. ROSE, Esq.,
Of counsel.

BENJAMIN SLADE, Esq.,
Of counsel.

We hereby certify that the above plea is not interposed for delay but should be sustained on the merits.

Dated New York, January 4, 1915.

KELLOGG & ROSE,
Attorneys for defendant, Oppenheimer.

102 UNITED STATES OF AMERICA,
Southern district of New York,
State, city, and county of New York. } *ss.*

Herman H. Oppenheimer, being duly sworn, deposes and says: That he is one of the defendants in the within action. That he has read the foregoing plea in abatement and knows the contents thereof.

That the facts herein alleged are obtained from the various sources and personal observation and deponent believes them to be true.

This plea is not made for the purpose of delay.

HERMAN H. OPPENHEIMER.

Sworn to before me this 4th day of January, 1915.

J. CARER BECHER,
Com. of Deeds, N. Y. C.

103 (Indorsed:) United States District Court, Southern District of New York. United States of America v. Jaques Samuels, Herman H. Oppenheimer, et al., defendants. Plea in abatement. Kellogg & Rose, attorneys for Deft. Oppenheimer, 115 Broadway, Borough of Manhattan, New York City. U. S. District Court. Filed Jan. 4, 1915, S. D. of N. Y. Copy received Jan. 4, 1915. U. S. Attorney's Office, H. Snowden Marshall.

104 United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA,
against
JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAM- } No. 7-237.
UELS, HERMAN J. DIETZ, CHARLES HEPNER AND
HERMAN H. OPPENHEIMER. }

Plea in bar.

Now comes into court the defendant, Herman H. Oppenheimer, in his own proper person and by counsel, and having read the indictment against him, says that he is not guilty in manner and form as charged therein, and for his trial puts himself upon the country, and this defendant also says that the United States ought not further to prosecute the said indictment against him because of the following matters and things which he pleads in bar on this prosecution for any and all

of the alleged defenses therein charged, and respectfully avers and says, as follows:

1. It appears from the records of this court that the indictment herein is barred by reason of the adjudication by this court on the indictments in this court, in re United States against the same parties who are defendants in this indictment, which indictments were numbered 2461 and 2462.

2. The indictment is barred by the statute of limitations contained in section 29-d of the Bankruptcy Law of 1898.

3. The indictment does not charge an offense cognizable by this court or covered by the statutes of the United States of America.

105 4. That the grand jury, when it voted this indictment, had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both, and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment alleges that the defendant, Oppenheimer, gave certain false and fraudulent testimony on January 19th, 1914, and there was no legal or competent evidence before the said grand jury that he had so testified, and there never was such testimony given by said defendant, Oppenheimer.

5. That the grand jury, when it voted this indictment, had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both, and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment charges the defendant, Oppenheimer, with having received payment of a note given to him by the bankrupt during September, 1912. There was no competent legal evidence before the said grand jury of the said fact.

6. That the grand jury, when it voted this indictment had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against the said defendant, Oppenheimer, and did not have competent legal evidence as to either or both, and the same more fully appears by the records of the said grand jury and more particularly from the facts that the said indictment charges that the defendant, Oppenheimer, conspired with
106 various persons and there was no competent legal evidence before the grand jury of the creation or existence of the said conspiracy.

Wherefore the said Herman H. Oppenheimer, prays judgment of the said indictment whether the United States of America ought or

can prosecute him in the premises and that he may be discharged thereof without delay, and the indictment quashed.

New York, January 4th, 1915.

KELLOGG & ROSE,
Attorneys for Defendant, Oppenheimer,
Office and P. O. Address, 115 Broadway,
Manhattan, New York City.
ABRAM J. ROSE, Esq.,
Of Counsel.
BENJAMIN SLADE, Esq.,
Of Counsel.

We hereby certify that the above plea is not interposed for delay, but should be sustained on the merits.

New York, January 4th, 1915.

KELLOGG & ROSE,
Attorneys for Defendant, Oppenheimer.

107 UNITED STATES OF AMERICA,
Southern district of New York,
State, city, and county of New York. } ss:

Herman H. Oppenheimer, being duly sworn, deposes and says: That he is one of the defendants in the within action. That he has read the foregoing plea in bar and knows the facts thereof. That the facts therein alleged are obtained from various sources and personal observations. Deponent believes them to be true.

That this plea is not interposed for the purpose of delay.

HERMAN H. OPPENHEIMER.

Sworn to before me this 4th day of January, 1915.

J. CARL BECHER,
Com. of Deeds,
N. Y. City.

108 (Indorsed:) United States District Court, Southern District of New York, United States of America, against Jacques Samuels, Herman H. Oppenheimer, et al., defendants. (Copy.) Plea in bar. Kellogg & Rose, attorneys for Defendant Oppenheimer, 115 Broadway, borough of Manhattan, New York City. Copy received Jan. 4, 1915. H. Snowden Marshall, U. S. Attorney's Office.

109 United States District Court, Southern District of New
York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
HERMAN H. OPPENHEIMER, DEFENDANT. }

Joinder in demurrer to indictment.

And the said H. Snowden Marshall, who prosecutes for the said United States in this behalf, says that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said Herman H. Oppenheimer to answer the same; and this the said H. Snowden Marshall, who prosecutes as aforesaid, is ready to verify and approve the same as the court here shall direct and award.

Wherefore, inasmuch as the said Herman H. Oppenheimer has not answered to the said indictment or hitherto in any manner denied the same, the said H. Snowden Marshall for the said United States prays judgment that the said Herman H. Oppenheimer may answer over to the said indictment.

H. SNOWDEN MARSHALL,

United States Attorney.

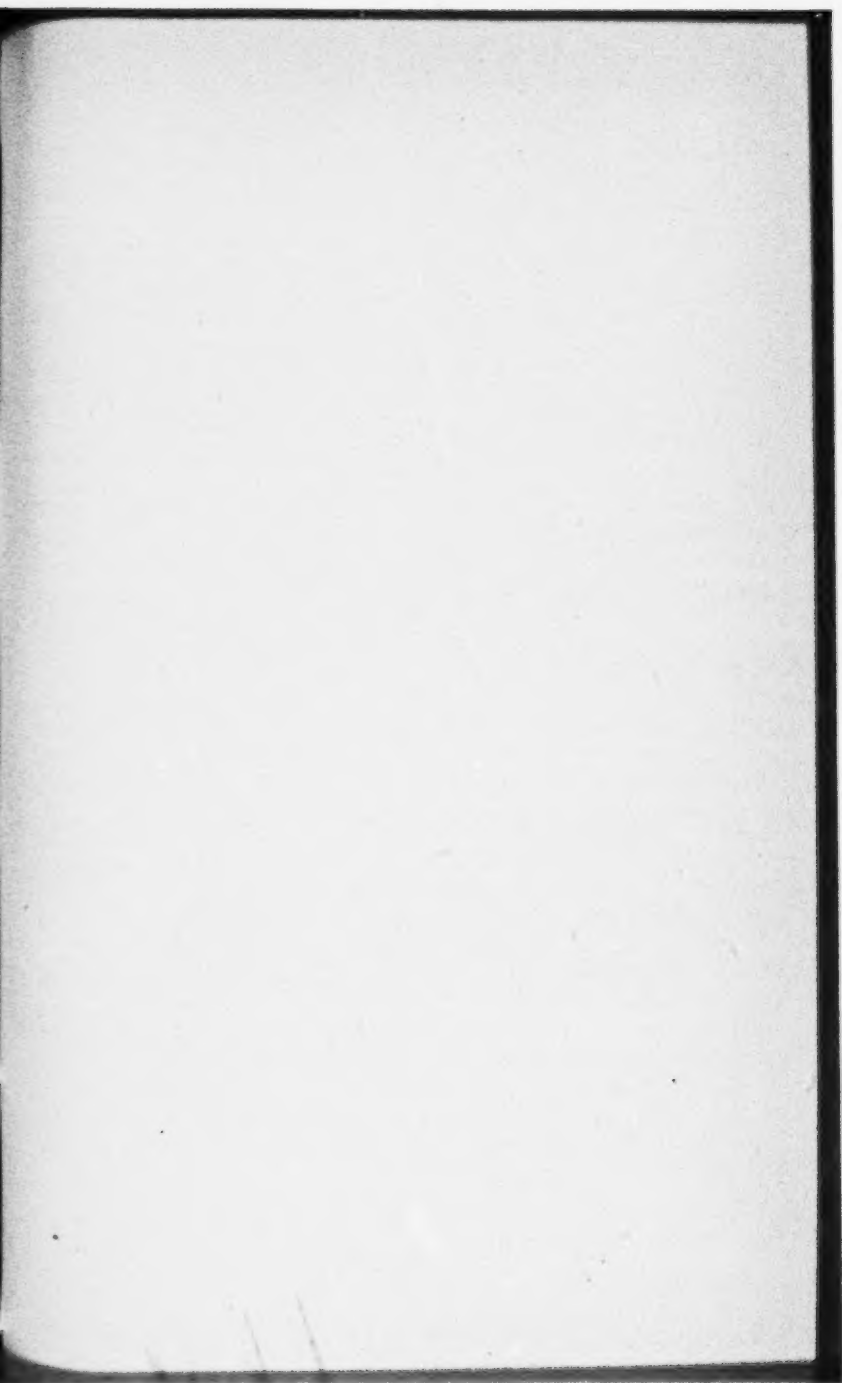
110 (Indorsed:) U. S. District Court, Southern District of New
York. United States of America, plaintiff, versus Herman
H. Oppenheimer, defendant. Joinder in demurrer to indictment.

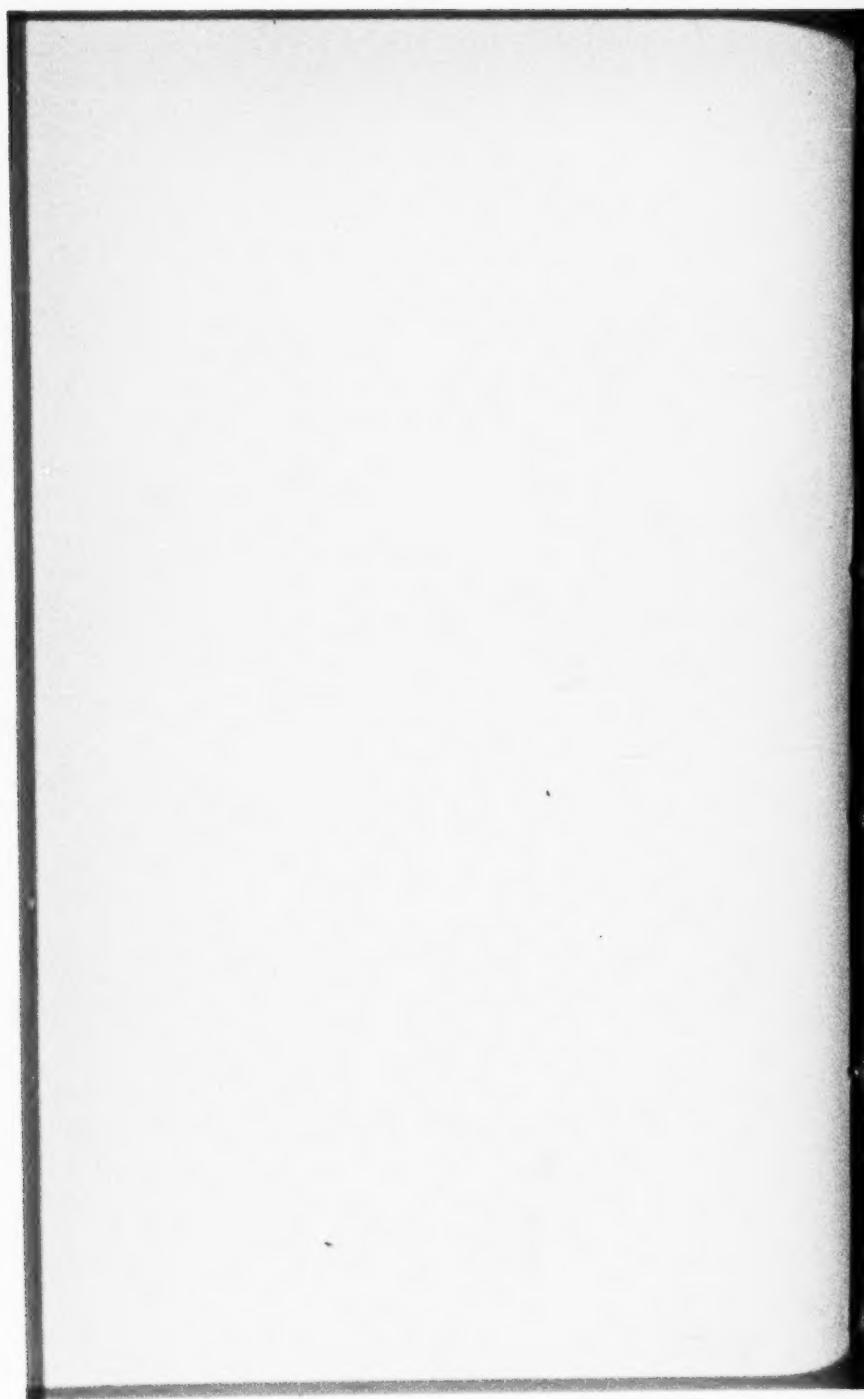
H. Snowden Marshall, United States Attorney, attorney for pltf.

111 (Indorsed:) No. 899. Supreme Court of the United
States. October term, 1915. United States of America,
plaintiff in error, v. Herman H. Oppenheimer, et al., defendant in
error. Stipulation for enlarged record. Office of the Clerk Supreme
Court U. S. Received Apr. 21, 1916.

112 (Indorsed:) File No. 25,182. Supreme Court U. S.
October term, 1915. Term No. 899. The United States,
pl'ff in error, vs. Herman H. Oppenheimer et al. Stipulation of
counsel and addition to record. Filed April 21, 1916.

(Indorsement on cover:) File No. 25,182. S. New York. D. C.
U. S. Term No. 899. The United States, plaintiff in error, vs.
Herman H. Oppenheimer, et al. Filed March 15th, 1916. File
No. 25,182.





STANDARD FORM NO. 64

THE OFFICE OF THE SECRETARY OF THE ARMY

WASHINGTON, D. C.

IN ORDER TO OBTAIN THIS FORM, WRITE TO THE
DIRECTOR, ARMY MATERIALS DIVISION, 1215

THE ARMY MATERIALS DIVISION

(25,100)

(25,182)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 899.

THE UNITED STATES, PLAINTIFF IN ERROR,

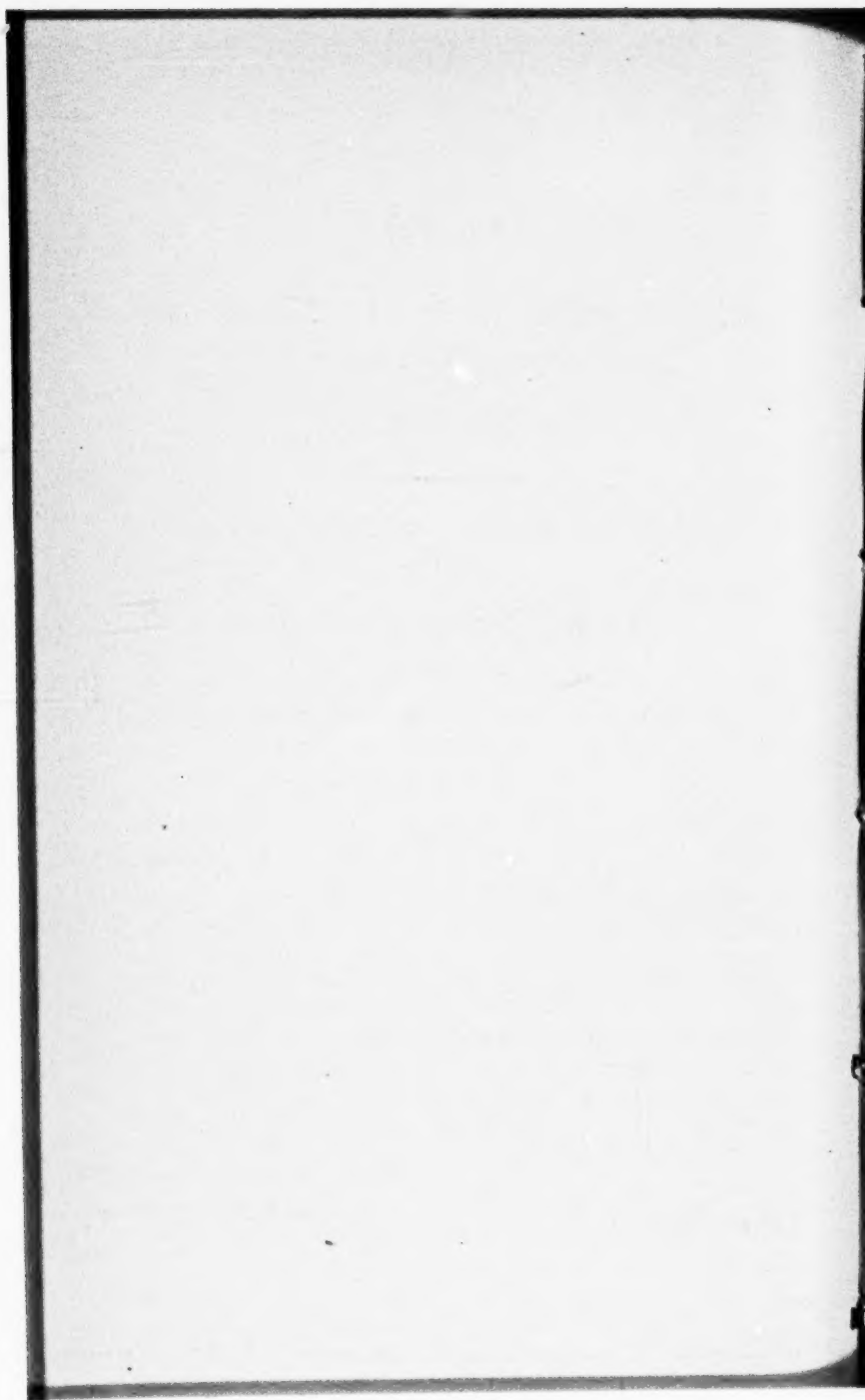
vs.

HERMAN H. OPPENHEIMER ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Writ of error.....	1	1
Petition for writ of error.....	4	3
Indictment (2462)	14	3
Indictment (2882)	26	9
Motion to quash.....	40	14
Affidavit of Herman H. Oppenheimer.....	43	16
Affidavit of Herbert A. Mossler.....	46	18
Notice of motion to strike plea in abatement.....	76	20
Notice of motion to strike demurrer, etc.....	78	21
Affidavit of Samuel Hershenstein.....	79	21
Docket entries	81	22
Opinion, Thomas, J.....	82	23
Order quashing indictment.....	89	25
Assignment of errors.....	90	26



a

Index.

Writ of Error	1
Clerk's Certificate	2
Petition for Writ of Error	3
Indictment—No. 2641 Docket 6-333.....	5
Indictment—No. 2642 Docket 6-334.....	14
Demurrer of Defendant Herman H. Oppenheimer.....	23
Motion to Quash, Plea in Bar and Abatement on behalf of Herman H. Oppenheimer.....	24
Indictment—No. 2882 Docket 7-278.....	26
Demurrer of Defendant Herman H. Oppenheimer.....	36
Motion to Quash on behalf of Herman H. Oppenheimer.....	40
Affidavit of Herman H. Oppenheimer.....	43
Affidavit of Herbert A. Mossler.....	46
Additional Affidavit of Herbert A. Mossler.....	48
Exhibit, Testimony of Herman H. Oppenheimer before Referee in Bankruptcy.....	50
Notice of Motion that Plea in Abatement be stricken from the record	76
Notice of Motion to Strike out Demurrer, etc.....	78
Affidavit of Samuel Hershenstein.....	79
Docket Entries.....	81
Opinion, Thomas, J. dismissing indictments.....	82
Opinion, Pope, J. quashing indictment.....	86
Order Quashing Indictment.....	89
Assignment of Errors.....	90
Citation	92

1 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court of the United States for the Southern District of New York, in the Second Circuit, before you or some of you, between the United States of America and Herman H. Oppenheimer, et al., a manifest error hath happened to the great damage of the said United States of America, as by its complaint appears:

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within

30 days of the date hereof; that the record and proceedings aforesaid being accepted, the said Supreme Court may cause further to be done therein to correct that error, what by right and according to the laws and customs of the United States should be done.

2 Witness, The Honorable Edward D. White, Chief Justice of the United States, the 26th day of February in the year of our Lord one thousand nine hundred and sixteen.

ALEX. GILCHRIST, JR.,
Clerk U. S. District Court for the
Southern District of New York.

The foregoing writ is hereby allowed.

AUGUSTUS N. HAND,
United States District Judge for the
Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages numbered from four to ninety-three inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of United States of America, Plaintiff in Error, against Herman H. Oppenheimer, et al., Defendants in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of March, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and fortieth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., Clerk.

3 [Endorsed:] C. 7-278. 7/278. U. S. District Court, Southern District of New York. United States of America versus Herman H. Oppenheimer et al. Writ of Error. H. Snowden Marshall, United States Attorney, Attorney for U. S. Service of a copy of the within is hereby admitted. New York, Feb. 28, 1916. Kellogg & Rose, Attorneys for def'ts to Messrs. Kellogg & Rose, Attorney- for def'ts, 115 Broadway, New York, N. Y. U. S. District Court, S. D. of N. Y. -Filed Feb. 28, 1916.

4-13

Petition for Writ of Error.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA

vs.

HERMAN H. OPPENHEIMER et al.

Now comes the United States of America, by its attorney, H. Snowden Marshall, and complains that in the record and proceedings had in this cause, and in the order and judgment sustaining defendant's motion to quash the indictment herein, and dismissing said indictment, which judgment was duly made and filed in the office of the Clerk of the United States District Court for the Southern District of New York, on February 2, 1916, and the amended judgment which was filed on February 14, 1916, and which order was duly made and filed in the office of the said Clerk of the District Court for the Southern District of New York, on the 26th day of February, 1916, a manifest error has happened as will appear in the assignment of errors herewith submitted.

Wherefore, The United States of America prays for the allowance of a writ of error, and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated: New York, February 26th, 1916.

H. SNOWDEN MARSHALL,

U. S. Attorney.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 26, 1916.

14

2462-6-334.

Indictment.

District Court of the United States of America for the Southern District of New York.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, Begun and Held in the City of New York, within and for the District Aforesaid, on the First Tuesday of February in the Year of Our Lord One Thousand Nine Hundred and Fourteen, and Continued by Adjournment to and Including the 24th day of February, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

SOUTHERN DISTRICT OF NEW YORK, ss:

The Grand Jurors of the United States of America, within and for the District aforesaid, on their oath present that during the year nineteen hundred and twelve, and up to and including the fifth day of August, nineteen hundred and twelve, Jacques Samuels and Joseph

Samuels, late of the City and County of New York, were engaged in business at No. 129 West 20th Street, in the City, County and State of New York as copartners, doing business under the firm name of Joseph Samuels & Co., as manufacturers and dealers in braids and embroideries, and kindred merchandise; that Jacques Samuels was and is a resident of the City and County of New York; that Joseph Samuels was, and is a resident of the City and County of New York; that Abraham Samuels was and is a resident of the City and County of New York; that Reuben Samuels was and is a resident of the City and County of New York and that Ray Abrahams was and is a resident of the City and County of New York; that Herman J. Dietz

was and is a resident of the City and County of New York;
15 that Isaac Anderson was and is a resident of the City and County of New York; that Charles Hepner was and is a resident of the City and County of New York; that Herman H. Oppenheimer was and is an attorney at law in the City of New York, with offices at 170 Broadway, City and County of New York; that on the fifteenth day of June, nineteen hundred and twelve, and continuously on all other days thereafter to and including the 24th day of February, in the year of our Lord one thousand nine hundred and fourteen, in the County of New York, Southern District of New York, and within the jurisdiction of this Court and under the circumstances aforesaid, the said Jacques Samuels and Joseph Samuels, copartners doing business as aforesaid, under the firm name of Joseph Samuels & Company, as aforesaid, and the said Abraham Samuels, Reuben Samuels, Ray Abrahams, Herman J. Dietz, Isaac Anderson, Charles Hepner and Herman H. Oppenheimer then and there anticipated, contemplated and planned that a petition in bankruptcy should thereafter be filed to have the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as a copartnership, adjudicated bankrupts under the bankruptcy laws of the United States; that thereafter, in the due course of the bankruptcy proceedings, a trustee for the estate in bankruptcy of the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as a copartnership, should be duly appointed.

And the grand jurors aforesaid, on their oath aforesaid, do further present that on the fifth day of August, nineteen hundred and twelve, a petition in bankruptcy was duly filed in the United States District Court for the Southern District of New York to have the said Jacques

Samuels and Joseph Samuels, doing business as aforesaid
16 under the firm name of Joseph Samuels & Co., individually and as copartners, adjudicated bankrupts; that on the 5th day of August, nineteen hundred and twelve, Alexander S. Webb was duly appointed receiver of the assets and effects of the said copartnership of the said Jacques Samuels and Joseph Samuels, copartners doing business as aforesaid, and of the individual estates of said Jacques Samuels and Joseph Samuels, and on the sixth day of August, 1912, the said Alexander S. Webb duly qualified as such; that on the 23rd day of October the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co.,

individually and as copartners, were adjudicated bankrupts by the said United States District Court; that on the fourth day of November, nineteen hundred and twelve, Alexander S. Webb was duly appointed trustee of the assets and effects of the estate in bankruptcy of the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., and of their individual estates, and the said Alexander S. Webb, on the thirteenth day of November, nineteen hundred and twelve, duly qualified as such.

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Reuben Samuels, Ray Abrahams, Herman J. Dietz, Isaac Anderson, Charles Hepner and Herman H. Oppenheimer, on the 15th day of June, 1912, and continuously on all other days thereafter to and including the 24th day of February, nineteen hundred and fourteen, in the County of New York, Southern District of New York, and within the jurisdiction of this Court and under the circumstances aforesaid, did willfully, knowingly and unlawfully conspire together to commit an offense against the United States, that is

17 to say, the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Reuben Samuels, Ray Abrahams, Herman J. Dietz, Isaac Anderson, Charles Hepner and Herman H. Oppenheimer, did willfully, knowingly and unlawfully conspire and corruptly and fraudulently agree among themselves that they would knowingly and fraudulently, while the said Jacques Samuels and Joseph Samuels, individually and as copartners doing business as aforesaid under the firm name of Joseph Samuels & Co. should be bankrupts as aforesaid, conceal from said Alexander S. Webb, the trustee of the said estates in bankruptcy, certain properties and moneys, which would, in the due course of the administration of said estates in bankruptcy, belong to the said estates in bankruptcy, to wit, certain moneys which had theretofore been on deposit in banking institutions in the City of New York, to the credit of said Jacques Samuels and Joseph Samuels and of said copartnership Joseph Samuels & Co., to an amount upwards of one thousand dollars (\$1,000.00), and property consisting of certain shares of stock of the Borough Apartment Company, a corporation existing and organized under the laws of the State of New York, which said certificates of stock had been issued by the said Borough Apartment Co., in the name of the said Jacques Samuels and said Joseph Samuels and were the property of said copartnership of Joseph Samuels & Company, the value of said certificates of stock being upwards of the sum of one thousand dollars (\$1,000.00), and other property, the kind, amount and particular description of which, and the exact amount and value of which, is now to the grand jurors unknown.

And in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels and Abraham Samuels did on or about June 28th, nineteen hundred and twelve, in the County of New York, Southern District of New York, make and cause to be made,
18 false and fictitious entries in a certain book called "time-book" belonging and appertaining to the business of Joseph Samuels

& Co., whereby it was made to appear that one William Erlich was employed by said copartnership on January 6, nineteen hundred and twelve and continuously thereafter until May 6th, 1912, and had received from said copartnership for said services the sum of forty dollars (\$40.00) a week on January 6th, 1912, and continuously weekly thereafter up to and including May 6th, 1912, whereas, in truth and in fact, the said William Erlich was not employed by said copartnership until May 6th, 1912, and did not receive from said copartnership any sum or sums of money for services prior to said May 6th, 1912.

And further in pursuance of and to effect the object of said conspiracy, said Jacques Samuels and said Joseph Samuels did, on or about June 20th, 1912, destroy a certain book of account belonging and appertaining to the business of said copartnership of Joseph Samuels & Co., called purchase ledger, and certain other books of account, the number and more particular description of which are now to the grand jurors unknown.

And further in pursuance of and to effect the object of said conspiracy, the said Reuben Samuels did, on June 24th, 1912, receive from said copartnership, Joseph Samuels & Co., the sum of twenty four hundred dollars (\$2,400.00), which said money was the property of the said copartnership of Joseph Samuels & Co., and which moneys would, in due course of the administration of said estate in bankruptcy, belong to said estate in bankruptcy of said copartnership.

And further in pursuance of and to effect the object of said conspiracy, the said Ray Abrahams did on or about November 25th, 1912, receive from said Jacques Samuels a large sum of money, an amount in excess of one thousand dollars (\$1,000.00), the exact amount of which is now to the grand jurors unknown, the property of said copartnership of Joseph Samuels & Co., and which
 19 would, in the due course of the administration of said estates in bankruptcy, become the property of the said estate in bankruptcy of the said copartnership of Joseph Samuels & Co., and did thereafter conceal the said moneys from said Alexander S. Webb, the trustee of the estate in bankruptcy of the said copartnership.

And further in pursuance of and to effect the object of said conspiracy, the said Herman J. Dietz did, on or about June 28th, 1912, sign and deliver to said Jacques Samuels a certain promissory note, for the sum of forty-five hundred dollars (\$4500.00), which said note was marked "Non Negotiable," and was in words and figures as follows:

\$4,500.00/100.

NEW YORK, May 16, 1912.

Four months after date, I promise to pay to Joseph Samuels & Co. Forty Five Hundred 00/100 Dollars, at The Columbia Bank, 407 B'way, N. Y.

Value received.

Non negotiable.

H. J. DIETZ.

No. — Due Sept. 16.

And further in pursuance of and to effect the object of said conspiracy, the said Isaac Anderson did, on June 17th, 1912, write his endorsement upon the back of a certain check drawn by said Jacques Samuels in the name of Joseph Samuels & Co., upon the Second National Bank of the City of New York, to the order of "I. Anderson" in the amount of three thousand dollars (\$3,000.00), which said check and said endorsement on the back of said check are as follows:

20

Face of Check.

No. 17.

Joseph Samuels & Co.
Braid and Embroideries.

NEW YORK, June 17, 1912.

Pay to the order of I. Anderson \$3,000.00/100 Three thousand 00/100 Dollars.

To the Second National Bank of the City of New York.

JOS. SAMUELS & CO.

Back of Check.

* * * * *

Endorsements: I. Anderson, Jos. Samuels & Co., Harry Siegel.

And further in pursuance of and to effect the object of said conspiracy, the said Charles Hepner did, on July 25th, 1912, write his endorsement upon the back of a certain check drawn by the said Jacques Samuels in the name of Joseph Samuels & Co., upon the Pacific Bank in the City of New York, to the order of Charles Hepner in the amount of \$405.40, which said check and the endorsement upon the back of said check are as follows:

Face of Check.

No. 160.

NEW YORK, July 25, 1912.

The Pacific Bank,
Madison Avenue Branch, 28th St.

Pay to the order of Charles Hepner Four hundred & five 40/100 Dollars.

\$405.40/100.

JOS. SAMUELS & CO.

Back of Check: Jos. Samuels & Co. Charles Hepner.

21

And further, in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels did, on July 22nd, 1912, take from the funds of said copartnership of Joseph Samuels & Co., the sum of \$1100.00, which said sum of money would, in

the due course of the administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said copartnership, and did conceal and secrete the said sum of \$1100.00 from said Alexander S. Webb, the trustee of said estate in bankruptcy.

And further, in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels did, on July 26th, 1912, take from the funds of said copartnership of Joseph Samuels & Co. the sum of \$2500.00, which said sum of money would, in the due administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said copartnership, and did conceal and secrete the said sum of \$2500.00 from said Alexander S. Webb, the trustee of said estate in bankruptcy.

And further, in pursuance of and to effect the object of said conspiracy, the said Herman H. Oppenheimer, on July 29th, 1912, received the sum of one thousand dollars (\$1,000.00) from the said copartnership of Joseph Samuels & Company; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

H. SNOWDEN MARSHALL,
United States Attorney.

22-25 (Endorsed:) 2462. 6-334. U. S. District Court. The United States of America vs. Jacques Samuels and Joseph Samuels, doing business under the firm name of Samuels & Co., Abraham Samuels, Reuben Samuels, Ray Abrahams, Herman J. Dietz, Charles Hepner and Herman H. Oppenheimer and Isaac Anderson.—Indictment. Conspiracy to conceal assets from trustee in bankruptcy—Sec. 29b Bankruptcy Act, 37, U. S. C. X. H. Snowden Marshall, U. S. Attorney.—A True Bill Henry Lewis, Foreman.—U. S. District Court, S. D. of N. Y., Filed Feb. 24, 1914.

Feb'y 25th, '14. H. H. Oppenheimer arraigned and pleads not guilty—leave to withdraw by Mch. 20/14. Bail \$2500.00.

Reuben Samuels arraigned and pleads n. g. Time to withdraw as above.

Ray Abrahams, same entry as above.

Jacques Samuels, Same entry as above.

Joseph Samuels, Same entry as above.

Abraham Samuels, Same entry as above.

Chas. Hepner, Same entry as above.

Bail previously given to stand.

Feb. 26, H. J. Dietz pleads not guilty.

Feb. 27, Isaac Anderson pleads not guilty.

May 1, 1914, Filed motion to quash.

Mch. 24, Filed demurrer of H. H. Oppenheimer.

Oct. 1, Filed opinion, Thomas, J. Demurrer sustained. Indictment dismissed as to—H. Oppenheimer, A. Samuels, C. Hepner, R. Abrahams.

Indictment.

2882. 7-278.

District Court of the United States of America for the Southern District of New York.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held in the City of New York, within and for the District aforesaid, on the first Tuesday of December in the year of our Lord one thousand nine hundred and fourteen, and continued by adjournment to and including the 21st day of December in the year of our Lord one thousand nine hundred and fourteen.

SOUTHERN DISTRICT OF NEW YORK, ss:

The Grand Jurors of the United States of America, within and for the District aforesaid, on their oath present, that during the year nineteen hundred and twelve, and up to and including the fifth day of August, nineteen hundred and twelve, Jacques Samuels and Joseph Samuels, late of the City and County of New York, were engaged in business at number 129 West 20th Street, in the City, County and State of New York, as co-partners, doing business under the firm name of Joseph Samuels & Co., as manufacturers and dealers in braids and embroideries, and kindred merchandise; that Jacques Samuels was and is a resident of the City and County of New York; that Joseph Samuels was and is a resident of the City and County of New York; that Abraham Samuels was and is a resident of the City and County of New York; that Herman J. Dietz was and is a resident of the City and County of New York; that Charles Hepner was and is a resident of the City and County of New York; that Herman H. Oppenheimer was and is an attorney at law in the City and County of New York, with offices at
27 Number 170 Broadway, City and County of New York; and was the attorney for said Joseph Samuels & Co., individually and as a co-partnership as aforesaid; that on the fifteenth day of June, nineteen hundred and twelve, in the County of New York, Southern District of New York, and within the jurisdiction of this Court, the said Jacques Samuels and Joseph Samuels, co-partners doing business as aforesaid, under the firm name of Joseph Samuels & Co., then and there anticipated, contemplated and planned that a petition in bankruptcy should thereafter be filed to have the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as a co-partnership, adjudicated bankrupt under the bankruptcy laws of the United States; and that thereafter, in the due course of the bankruptcy proceedings, a trustee for the estate in bankruptcy of the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph

Samuels & Co., individually and as a co-partnership, should be duly appointed.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on the fifth day of August, nineteen hundred and twelve, a petition in bankruptcy was duly filed in the United States District Court for the Southern District of New York to have the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as co-partners, adjudicated bankrupts; that on the fifth day of August, nineteen hundred and twelve, Alexander S. Webb, was duly appointed receiver of the assets and effects of the said co-partnership, doing business as aforesaid, and of the
28 individual estates of said Jacques Samuels and Joseph Samuels, and on the sixth day of August, nineteen hundred and twelve, the said Alexander S. Webb, duly qualified as such; that on the twenty-third day of October the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., individually and as co-partners, were duly adjudicated bankrupts by the said United States District Court; that on the fourth day of November, nineteen hundred and twelve, Alexander S. Webb was duly appointed trustee of the assets and effects of the estate in bankruptcy of the said Jacques Samuels and Joseph Samuels, doing business as aforesaid under the firm name of Joseph Samuels & Co., and of their individual estates, and the said Alexander S. Webb, on the thirteenth day of November, nineteen hundred and twelve, duly qualified as such, and thereafter continued to act as such trustee up to and including the 21st day of December, nineteen hundred and fourteen.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that the said Jacques Samuels and Joseph Samuels, on the fifteenth day of June, nineteen hundred and twelve, and continuously on all other days thereafter to and including the 21st day of December, nineteen hundred and fourteen, in the County of New York, Southern District of New York, and within the jurisdiction of this Court and under the circumstances aforesaid, did wilfully, knowingly and unlawfully conspire together, and with the said Abraham Samuels, Herman J. Dietz, Charles Hepner, and Herman H. Oppenheimer, and each of them, to commit an offense against the United States, that is to say, the said Jacques Samuels, Joseph
29 Samuels, Abraham Samuels, Herman J. Dietz, Charles Hepner and Herman H. Oppenheimer, did wilfully, knowingly and unlawfully conspire and corruptly and fraudulently agree among themselves that they would knowingly and fraudulently, while the said Jacques Samuels and Joseph Samuels, individually and as co-partners doing business as aforesaid under the firm name of Joseph Samuels & Co., should be bankrupts as aforesaid, conceal from the said trustee of the said estates in bankruptcy, certain properties and moneys, which would, in the due course of the administration of said estates in bankruptcy belong to the said estates in bankruptcy, to wit, certain moneys on deposit in banking institutions in the City of New York, to the credit of said Jacques Samuels

and Joseph Samuels, and of the said co-partnership Joseph Samuels & Co., to an amount upwards of one thousand dollars (\$1,000.00) and certain other moneys and choses in action which would thereafter become due from customers of the said co-partnership for merchandise sold to said customers by said co-partnership, and property consisting of certain shares of stock of the Borough Apartment Company, a corporation organized and existing under the laws of the State of New York, which said certificates of stock had been issued by the said Borough Apartment Co. in the names of the said Jacques Samuels and said Joseph Samuels, and were the property of said co-partnership of Joseph Samuels & Co., the value of said certificates of stock being upwards of the sum of one thousand dollars (\$1,000.00) and other property, the kind, amount and particular description of which, and the exact amount and value of which, is now to the Grand Jurors unknown; and the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Herman J. Dietz, Charles Hepner and Herman H. Oppenheimer did, beginning with the said fifteenth day of June, nineteen hundred and twelve, conceal the aforesaid money and property belonging to the said co-partnership, and continued to conceal the same until the thirteenth day of November, nineteen hundred and twelve, when said Alexander S. Webb
30 was appointed trustee as aforesaid, and since said thirteenth day of November, nineteen hundred and twelve, did continue to conceal the same from said trustee up to and including the 21st day of December, nineteen hundred and fourteen.

And in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels, Abraham Samuels and Herman H. Oppenheimer did on or about the twenty-eighth day of June, nineteen hundred and twelve, in the County of New York, Southern District of New York, make and cause to be made, and counsel and advise the making of false and fictitious entries in a certain book called "time-book" belonging and appertaining to the business of Joseph Samuels & Co., whereby it was made to appear that certain persons and employees, employed by said co-partnership had received from said co-partnership for their services more money than such persons and employees had actually received.

And further in pursuance of and to effect the object of said conspiracy, the said Abraham Samuels did, on or about the 28th day of June, 1912, in the County of New York, Southern District of New York, write up and cause to be written up a certain book called "time book" belonging to and pertaining to the business of Joseph Samuels & Company, whereby it was made to appear by the recording of false and fictitious entries therein that certain persons and employees employed by the said co-partnership had received from said co-partnership for their services more money than such persons and employees had actually received.

34 And further in pursuance of and to effect the object of said conspiracy, said Jacques Samuels, said Joseph Samuels and said Herman H. Oppenheimer did, on or about June 20, 1912, destroy and cause to be destroyed and counsel and advise the de-

struction of a certain book of accounting belonging and appertaining to the business of said co-partnership of Joseph Samuels & Co., called "purchase ledger," and certain other books of account, the number and more particular description of which are now to the Grand Jurors unknown.

And further in pursuance of and to effect the object of said conspiracy, the said Herman J. Dietz, at the request and upon the advice of said Jacques Samuels and said Herman H. Oppenheimer, did, on or about June 28, 1912, sign and deliver to said Jacques Samuels a certain promissory note, for the sum of forty-five hundred dollars (\$4500.00), which said note was marked "Non negotiable," and was in words and figures as follows:

\$4,500.00/100.

NEW YORK, May 16, 1912.

Four months after date, I promise to pay to Joseph Samuels & Co. Forty Five Hundred 00/100 Dollars at The Columbia Bank, 407 Broadway, N. Y.

Value received non negotiable.

No. —.

Due Sept. 16.

H. J. DIETZ.

for which promissory note no consideration was paid by said Joseph Samuels & Co., and was made and signed by said Herman J. Dietz for the purpose of making it to appear that the assets of the said estates in bankruptcy were greater than they actually were, as the said Jacques Samuels and the said Herman H. Oppenheimer well knew.

32 And further in pursuance of and to effect the object of said conspiracy, the said Charles Hepner did, on July 25, 1912, write his indorsement upon the back of a certain check drawn by the said Jacques Samuels in the name of Joseph Samuels & Co., upon the Pacific Bank in the City of New York, to the order of Charles Hepner, in the amount of \$405.40, which said check and the indorsement upon the back of said check are as follows:

Face of Check.

No. 160.

NEW YORK, July 25, 1912.

The Pacific Bank,
Madison Avenue Branch, 28th St.

Pay to the order of Charles Hepner Four hundred & five 40/100 Dollars.

\$405 40/100.

JOS. SAMUELS & CO.

Back of check: Jos. Samuels & Co. Charles Hepner.

And further in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels did, on July 22, 1912, take from

the funds of said co-partnership of Joseph Samuels & Co., the sum of \$1,100.00, which said sum of money would, in the due course of the administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said co-partnership and did conceal and secrete the said sum of \$1,100.00 from said Alexander S. Webb, the trustee of said estate in bankruptcy, and has since said 22nd day of July, 1912, continued to conceal said sum of money from said trustee, to and including the 21st day of December, 1914.

33 And further in pursuance of and to effect the object of said conspiracy, the said Jacques Samuels did, on July 26, 1912, take from the funds of said co-partnership of Joseph Samuels & Co., the sum of \$2500.00, which said sum of money would, in the due administration of said estates in bankruptcy, belong to the estate in bankruptcy of the said co-partnership, and did conceal and secrete the said sum of \$2500.00 from said Alexander S. Webb, the trustee of said estate in bankruptcy, and has, since said 26th day of July, 1912, continued to conceal said sum of money from said trustee, up to and including the 21st day of December, 1914.

And further in pursuance of and to effect the object of said conspiracy and in order to aid and assist the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Charles Hepner, Herman J. Dietz and Herman H. Oppenheimer in continuing the concealment from said Trustee in Bankruptcy, of the money and property belonging to the said estates in bankruptcy of the said Joseph Samuels & Co., so concealed from said Trustee in Bankruptcy, the said Herman H. Oppenheimer, in a bankruptcy proceeding instituted and pending in the United States District Court for the Southern District of New York, to have the said Jacques Samuels and one Benjamin Lesser, individually and as co-partners, doing business under the firm name of Abrahams & Lesser, adjudged bankrupts under the Bankruptcy Laws of the United States, and of which co-partnership the said Jacques Samuels was a member and principal owner, was examined before the said Macgrane Cox, Esquire, Referee in Bankruptcy, in support of an application made by the said Herman H. Oppenheimer for an allowance as the attorney for the said co-partnership of Abrahams & Lesser and the said Jacques Samuels as a member of said co-partnership; and the said Herman H.

34 Oppenheimer did, then and there, on the 19th day of January, 1914, willfully and falsely testify, in substance and effect, that he had, since the latter part of July, 1912, and up to the said 19th day of January, 1914, received no money or property in said bankruptcy action so pending against Joseph Samuels & Co., individually and as a co-partnership as aforesaid, as compensation for legal services, except that he, the said Herman H. Oppenheimer, had received an agreement to be paid compensation in addition to whatever allowance might be made to him by the Court for such services out of the estates in bankruptcy of said Joseph Samuels & Co., individually and as a co-partnership, as aforesaid, whereas, in truth and in fact, the said Herman H. Oppenheimer did, on or about the 1st day of September, 1912, receive from the said Jacques Samuels a promissory note in and for the sum of \$897.36, with in-

terest, made by the Universal Textile Company, a customer of said Joseph Samuels & Co., dated July 20, 1912, payable two months after date, to the order of Joseph Samuels & Co., and did thereafter, on September 11, 1912, receive payment therefor in the sum of \$897.36, which said promissory note and its proceeds was the property of the said co-partnership of Joseph Samuels & Co. and would, in the due administration of the said estates in bankruptcy, have belonged to the said estates in bankruptcy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (§37 U. S. C. C. and §29b of the Bankruptcy Act.)

H. SNOWDEN MARSHALL,

U. S. Attorney.

35-39 (Endorsed:) 7-278. 2882—U. S. District Court. The United States of America *vs.* Jacques Samuels, Joseph Samuels, Abraham Samuels, Herman J. Dietz, Charles Hepner and Herman H. Oppenheimer.—Indictment. Conspiracy to conceal assets from Trustee in Bankruptcy.—U. S. C. C. Sec. 37 and Sec. 29-b Bankruptcy Act.—H. Snowden Marshall, U. S. Attorney.—A True Bill. Eugene S. Benjamin, Foreman.—U. S. District Court, S. D. of N. Y. Filed Dec. 21, 1914.

1914, Dec. 22. Oppenheimer pleads not guilty. Bail \$500.

1915, Jan. 4. Def't Dietz pleads not guilty. Bail \$2,500.

Jan. 4. Filed Motion to quash, Plea in Abatement, Plea in Bar and Demurrer as to H. H. Oppenheimer.

Jan. 6. Filed demurrer and motion to quash and Special Plea in Bar as to H. J. Dietz.

Jan. 20. Dietz withdraws plea of not guilty.

Jan. 21. H. H. Oppenheimer withdraws pleas of not guilty.

Jan. 30. Filed Joinder in Demurrer.

1916, Feb'y 2. Filed Opinion—Pope, J. Indictment Ordered quashed and allowing defendants to go without day thereunder.

2882. 7-278.

40 United States District Court, Southern District of New York.

No. ~~7-287~~. 278

THE UNITED STATES OF AMERICA
against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER, and HERMAN H. OPPENHEIMER.

Motion to Quash on Behalf of Herman H. Oppenheimer.

And, now comes the defendant, Herman H. Oppenheimer, and moves this Court to set aside the indictment filed in this case for the following reasons:

1. It appears from the records of this Court that the indictment herein is barred by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462.

2. The indictment is barred by the statute of limitations contained in Section 29-d of the Bankruptcy Law of 1898.

3. The indictment does not set forth facts sufficient to constitute a crime under the Laws of the United States, now in force.

4. That the facts set forth in the indictment are impossible, indefinite and uncertain and do not inform the defendant sufficiently of the nature of the charge against him, as provided for by law.

5. The indictment does not charge an offense cognizable by this Court or covered by the statutes of the United States of America.

41 6. That the Grand Jury, when it voted this indictment had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment, against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both and the same more fully appears by the records of the said Grand Jury and more particularly from the facts that the said indictment alleges that the defendant, Oppenheimer, gave certain false and willful testimony on January 19th, 1914, and there was no legal or competent evidence before the said Grand Jury that he had so testified reference being made to the affidavits of H. H. Oppenheimer and Herbert A. Mossler hereto annexed, and there never was such testimony given by said defendant, Oppenheimer.

7. That the Grand Jury, when it voted this indictment had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both and the same more fully appears by the records of the said Grand Jury and more particularly from the facts that the said indictment charges the defendant, Oppenheimer, with having received payment of a note given to him by the bankrupt during September, 1912. There was no competent legal evidence before the said Grand Jury of the said fact.

8. That the Grand Jury, when it voted this indictment had no evidence before it showing the commission of the crime and the overt acts charged in the said indictment against said defendant, Oppenheimer, and did not have competent legal evidence as to either or both and the same more fully appears by the records of the said Grand Jury and more particularly from the facts that the said indictment alleges that the defendant, Oppenheimer, conspired with various persons and there was no competent legal evidence
42 before the Grand Jury of the creation or existence of the said conspiracy.

9. The said Grand Jury which voted the said indictment was improperly constituted and the members thereof were not proper persons to pass on the said indictment, at least one of them being interested in the subject matter thereof, as a creditor, and the said

Juror was present while the witnesses were being heard, and as defendant believes, during the deliberations and voted upon the said indictment, which fact was known to all of the said Grand Jurors who voted on the said indictment, in contravention to the Statutes of the United States now in force in reference to qualification of Grand Jurors and to the self-evident injury and harm of the defendant, Oppenheimer.

Wherefore, the said Herman H. Oppenheimer prays judgment of the said indictment whether the United States of America ought or can prosecute him in the premises and that he may be discharged thereof without delay, and the indictment quashed.

New York, January 4th, 1915.

KELLOGG & ROSE,
Attorneys for Defendant Oppenheimer.

O. & P. O. Address, 115 Broadway, Manhattan, New York City.

ABRAM J. ROSE, Esq.,
Of Counsel.

BENJAMIN SLADE, Esq.,
Of Counsel.

We hereby certify that the above plea is not interposed for delay but should be sustained on the merits.

Dated, New York, January 4th, 1915.

KELLOGG & ROSE,
Attorneys for Defendant Oppenheimer.

43 United States District Court, Southern District of New York.

No. 7-~~287~~. 278

UNITED STATES OF AMERICA
against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER, and HERMAN H. OPPENHEIMER.

Affidavit on Motion to Quash.

UNITED STATES OF AMERICA,
Southern District of New York,
State, City, and County of New York, ss:

Herman H. Oppenheimer, being duly sworn, deposes and says:
That he is one of the defendants herein.

That deponent never gave any evidence in any proceeding as stated in the last paragraph of the indictment herein, as more fully appears by a copy of the said testimony hereto annexed and made part hereof.

Deponent never signed the said testimony, nor were the hearings in the matter, in which it was given closed, nor was the said testi-

mony complete, all of which fully appears by the said testimony, and therefore deponent believes no valid indictment can ever be based on the said testimony.

The only persons present at the said hearing besides deponent were Honorable Macgrane Coxe, the referee, Frank C. McCarrick, the stenographer, Mr. Herman Heidelberg, Mr. Thomas Adams and Mr. Grenville Clark. Your deponent has asked Herman Heidelberg,

44 Thomas Adams and Mr. Grenville Clark whether they appeared before the Grand Jury that found the present indictment in December, 1914, and all of them replied that they had not appeared and had given no testimony, and the only other persons who were present at the said examinations, and who could testify to what was said thereat or identify the minutes thereof were the stenographer and referee, and they have denied that they have appeared before the Grand Jury who found the indictment, as more fully appears by the affidavit, of Herbert A. Mossler hereto annexed.

Wherefore, your deponent believes that no evidence whatever was given of testimony by deponent legally before the said Grand Jury.

Deponent further says that the statement in the last paragraph of the indictment to the effect that the said defendant, Oppenheimer, received payment of a certain note, deponent has asked all the persons who have knowledge of the same as to whether they appeared before the Grand Jury who found this indictment, and they have all stated to deponent that they have not appeared before the said Grand Jury, and deponent believes, therefore, that there was no legal evidence of the payment of the said note to deponent before the Grand Jury.

Deponent further says that he is informed and believes that the only witnesses who appeared before the Grand Jury that found this indictment were alleged co-conspirators and deponent believes that their testimony is insufficient on which to find an indictment for conspiracy, their declarations and acts or confessions being in Law, insufficient to establish the creation and existence of a conspiracy.

45 Deponent further says that one of the members of the said Grand Jury who found this indictment is a creditor of the Borough Apartment Realty Co., a corporation conducted entirely by the bankrupts, and referred to in the present indictment, in paragraph 4 thereof, as being part of the transferred and concealed assets and that the said person by reason of being a creditor of the said corporation alleged to be owned and directed by the bankrupts was an improper person to serve as a juror in this case, and deponent is informed and verily believes that the said person was present throughout the proceedings, took part in the deliberations and vote on the present indictment.

That the name of the said person is at present unknown to your deponent, but deponent can obtain the same through subpoenaing the members of the said Grand Jury and others who have refused to divulge the said juror's name or have forgotten the same.

HERMAN H. OPPENHEIMER.

Sworn to before me this 31st day of December, 1914.

J. CARL BECKER,
Com. of Deeds, New York City.

46 United States District Court, Southern District of New York.

No. 7-278.

UNITED STATES OF AMERICA
against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN
J. DIETZ, CHARLES HEPNER, and HERMAN H. OPPENHEIMER.

Affidavit on Motion to Quash.

UNITED STATES OF AMERICA,
Southern District of New York,
State, City, and County of New York, ss:

Herbert A. Mossler, being duly sworn, deposes and says:

That he is a Clerk in the Office of Herman H. Oppenheimer.

That during the month of December, 1914, he asked one Frank C. McCarrick, the stenographer referred to in the annexed affidavit of Herman H. Oppenheimer, whether he had appeared before the Grand Jury of the United States District Court, for the Southern District of New York, and the said Frank C. McCarrick told your deponent that he had not appeared before the said Grand Jury, during the said month.

Deponent then asked said McCarrick to make an affidavit to that effect but said McCarrick refused to do so, stating that he did not wish to be connected with the matter.

Deponent also asked Mr. Macgrane Coxe, the Referee in charge of the proceedings of Abraham & Lesser whether he had testified before the Grand Jury of this Court during the month of December, 1914,

47 and Mr. Coxe said he had not appeared or testified and deponent then asked whether the said referee would make an affidavit to the same and said referee, Macgrane Coxe replied that deponent could make his affidavit to the said effect.

HERBERT A. MOSSLER.

Sworn to before me this 31st day of December, 1914.

J. CARL BECKER,
Com. of Deeds, New York City.

(Endorsed:) Received Jan. 4, 1915. H. Snowden Marshall, U. S. Attorney. U. S. District Court, S. D. of N. Y. Filed Jan. 4, 1915.

48

Additional Affidavit on Motion to Quash.

United States District Court, Southern District of New York.

No. 7-278.

UNITED STATES OF AMERICA

against

JACQUES SAMUELS, HERMAN H. OPPENHEIMER et al.

Affidavit.

UNITED STATES OF AMERICA,

*Southern District of New York,**State, City, and County of New York, ss:*

Herbert A. Mossler, being duly sworn, deposes and says:

That he is a Clerk in the office of Herman H. Oppenheimer.

That on the 13th day of January, 1915, he was informed by Honorable Macgrane Coxe, Referee in charge of the case of Joseph Samuels & Co., and the Referee who was present at the taking of the examination of Herman H. Oppenheimer, which is more fully referred to in the indictment in this Court, numbered 7-278, that the said Referee had, at no time issued any duly authenticated copies of the testimony taken at the examination of the said Herman H. Oppenheimer, on January 19, 1914, nor had he issued any certified copies or other copies of it, with the certificate of its correctness.

Your deponent made inquiry of said referee and his clerks and the stenographer whether any legally certified copies of the said record had been issued and was informed that there was never any issued.

The said Referee is the person who has charge of said 49-75 record and the only person who can legally certify the same.

HERBERT A. MOSSLER.

Sworn to before me this 12th day of January, 1915.

J. CARL BECKER,
Com. of Deeds, N. Y. City.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 4, 1916.

76 United States District Court, Southern District of New York.

No. 7-278.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HERMAN H. OPPENHEIMER et al., Defendants.

Notice of Motion.

SIRS: Please take notice that a motion will be made before the United States District Court for the Southern District of New York, in the United States Court House & Post Office Building, at the term thereof for the hearing of criminal business, on Monday, the 25th day of January, 1915, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

1. That the defendant Herman H. Oppenheimer be directed to elect which of the documents filed herein, entitled as follows:

- a. "Demurrer,"
- b. "Plea in Abatement,"
- c. "Motion to quash on behalf of Herman H. Oppenheimer,"
- d. "Plea in bar,"

he stands on in this case, and that the other of said documents be stricken from the records of this Court until the adjudication on the document on which said defendant may elect to stand.

2. That the document entitled "Plea in Abatement" be stricken from the records of this Court on the ground that the defendant has filed a demurrer to the indictment herein and thus waived any defect which might be taken advantage of by a plea in abatement.

3. That the document entitled "Plea in Abatement" filed herein be stricken from the records on the ground that it is not properly verified as required by law.

4. For such other and further relief in the premises as may be just and proper.

Dated: New York, Jan. 21, 1915.

Yours, etc.,

H. SNOWDEN MARSHALL,

United States Attorney, Attorney for the Plaintiff.

Office & Post Office Address: U. S. Court House & Post Office Building, Borough of Manhattan, City of New York.

To Messrs. Kellogg & Rose, Attorneys for Defendant Oppenheimer, 115 Broadway, Borough of Manhattan, City of New York.

78 United States District Court, Southern District of New York

7-~~287~~. 278

UNITED STATES OF AMERICA, Plaintiff,

vs.

HERMAN H. OPPENHEIMER et al., Defendants.

Notice of Motion.

SIR: Please take notice that, upon the annexed affidavit of Samuel Hershenstein, duly verified on January 8, 1915, a motion will be made before the United States District Court, Southern District of New York, in the United States Court House and Post Office Building, at the term thereof for the hearing of criminal business, on Wednesday, the 13th day of January, nineteen hundred and fifteen, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, to strike from the records of this Court certain documents filed herein, entitled as follows: (1) "Demurrer"; (2) "Plea in Abatement"; (3) "Motion to Quash on Behalf of Herman H. Oppenheimer"; (4) "Plea in Bar," on the ground that at the time said documents were filed, the plea of "not guilty" theretofore entered by the defendant, Herman H. Oppenheimer, was not withdrawn and said plea of "not guilty" still remains of record in this Court.

Dated: New York, January 8th, 1915.

Yours, etc.

H. SNOWDEN MARSHALL,

*United States Attorney for the Southern District
of New York, Attorney for the Plaintiff.*

To Kellogg & Rose, Attorneys for the defendant Oppenheimer,
115 Broadway, New York City.

79 United States District Court, Southern District of New York.

No. 7-~~287~~. 278

UNITED STATES OF AMERICA, Plaintiff,

vs.

HERMAN H. OPPENHEIMER et al., Defendants.

Affidavit.

SOUTHERN DISTRICT OF NEW YORK,

City and County of New York, ss:

Samuel Hershenstein, being duly sworn, deposes and says, that he is an Assistant United States Attorney for the Southern District

of New York; that on December 21st, 1914, the United States Grand Jury for the Southern District of New York duly filed in this Court an indictment charging the above named defendant, Herman H. Oppenheimer, and others, with a violation of Section 37 of the United States Criminal Code; that on December 22nd, 1914, the said defendant, Herman H. Oppenheimer appeared in Court and pleaded to said indictment "not guilty" with leave to withdraw said plea by January 4, 1915, and demur or make any other plea or motion he may be advised on said date.

That on January 4th, 1915, the said Herman H. Oppenheimer did not withdraw said plea of "not guilty" but placed on file in said Court four documents entitled as follows: (1) "Demurrer"; (2) "Plea in Abatement"; (3) "Motion to Quash on Behalf of Herman H. Oppenheimer"; (4) "Plea in Bar"; that the plea of "not guilty" still remains upon the records of this Court, as well as the
80 other documents above referred to.

SAMUEL HERSHENSTEIN.

Sworn to before me this 8th day of January, 1915.

[SEAL.]

FREDERICK L. CAMPBELL,
Notary Public, Kings County, No. 127.

Certificate filed in New York County, No. 61, New York County.
Register's No. 6164, New York County.
Register's No. 6173, Kings County.
My Commission expires March 30, 1915.

(Endorsed:) Copy received Jan .8. 1915. Kellogg & Rose. Filed Jan. 21, 1915.

81

Docket Entries.

Criminal Docket. 7-278.

UNITED STATES

VS.

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER, and HERMAN H. OPPENHEIMER.

H. Snowden Marshall, U. S. Attorney.
Kellogg & Rose, 115 B'way, for Def't Oppenheimer.
Joseph I. Green, 141 B'way.

Conspiracy to conceal assets from Trustee in Bankruptcy.
Sec. 37, U. S. C. C. and Sec. 29-b Bankruptcy Act.
1914.

Dec. 21. Filed Indictment.

Dec. 22. Def't Herman H. Oppenheimer pleads not guilty. Bail \$500.

Dec. 22. Filed Recognizance of Oppenheimer.

1915.

- Jan. 4. Def't Dietz pleads not guilty. Bail \$2,500.
- Jan. 4. Filed Motion to quash, Plea in Abatement, Plea in Bar, and Demurrer as to Herman H. Oppenheimer.
- Jan. 6. Filed Demurrer and Motion to Quash, and special plea in Bar as to H. J. Dietz.
- Jan. 5. Filed Recognizance of Dietz.
- Jan. 20. Def't H. J. Dietz withdraws plea of not guilty.
- Jan. 21. Def't H. H. Oppenheimer withdraws plea of not guilty.
- Jan. 21. Filed Notice of Motion.
- Jan. 30. Demurrers and motion to quash argued—Judge Pope.
- Jan. 30. Pleas in Bar and Pleas in Abatement withdrawn from the record without prejudice to re-filing after decision on demurrer.
- Jan. 30. Filed Joinder in Demurrer.

1916.

- Feb. 2. Filed Opinion, Pope, J. Indictment Ordered Quashed and allowing Defendants to go without day thereunder.
- Feb. 14. Filed Amended Opinion, Pope, J.
- Feb. 26. Filed Order granting Motion to quash made by defendant Herman H. Oppenheimer (A. N. Hand, J.).
- Feb. 26. Filed Assignment of Errors, Petition for Writ of Error.
- Feb. 28. Filed Citation and Writ of Error, U. S. Supreme Court.
- Mar. 9. Stip. as to record.

82

Opinion.

District Court of the United States, Southern District of New York.

Nos. 2461-2462.

UNITED STATES OF AMERICA

vs.

JACQUES SAMUELS et als.

R. B. Woods, Esq., of New York City, Assistant District Attorney for the United States.

Abram J. Rose, Esq., Emanuel Jacobus, Esq., and Benjamin Slade, Esq., all of New York City for defendants.

THOMAS, *District Judge*:

The defendant and nine others were jointly indicted by the Grand Jury on February 24th, 1914, charged with a conspiracy to conceal assets from a trustee in Bankruptcy in violation of Sec. 29b of the Bankruptcy Act and with violating Sec. 37 of the United States Criminal Code.

Four of the defendants, Herman H. Oppenheimer, Abraham Samuels, Charles Hepner and Ray Abrahams, are represented by coun-

sel and pleadings bearing various titles have been filed in their behalf. Each of these four last mentioned defendants in his pleadings asks that the indictment, so far as it relates to him, be quashed for the reason that the acts alleged in the indictment are barred by the statute of limitations contained in Section 29d of the Bankruptcy Act. Said Section reads as follows:

"A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense."

83 In my opinion the above quoted section is determinative of the issues presented by the indictment against the aforementioned defendants who have, in their pleadings attacking the indictment, invoked the provision of said section, hence there is no occasion to determine other questions raised by pleadings some of which are of vital importance and decisive.

As already noted the indictment was returned February 24th, 1914. The last overt act alleged in the indictment was on November 25th, 1912.

There are no other facts alleged in the indictment which would warrant this Court in finding a continuous act of conspiracy from November 25th, 1912, to the date of the indictment, February 24th, 1914.

While it may be inferred from the language of the indictment that the concealment continued, no facts are alleged to show the continuance of the conspiracy, if one existed.

In *United States vs. Phillips*, 196 Fed. 574, Judge Hough of this District after carefully analyzing the cases of *U. S. v. Kissel*, 218 U. S., 601 and *U. S. v. Irvins*, 98 U. S., 450, arrived at this conclusion; that while the concealment may continue the crime of concealment was completed long before.

In the case of *In re Adams*, 171 Fed., 599, it is held that concealment must be from "a trustee." In the case at bar the indictment alleges that the trustee qualified on November 4th, 1912. The last overt act alleged in the indictment was twenty-one days later, to wit, on November 25th, 1912.

It is therefore apparent from the language of the indictment that more than one year elapsed after the appointment of
84 the trustee and after the date of the last overt act alleged therein before this indictment was found or filed in Court against these defendants.

If the Statute of Limitation provided for in the Bankruptcy Act, Section 29d is controlling, then these indictments should be dismissed as against the four defendants invoking the protection of that statute.

I find nothing in the language of these indictments that warrants a conclusion other than that the offenses therein described were offenses against the Bankruptcy Act and as such should be dealt with according to the plain provisions of that Act, one of which, Section 29d is a statute of limitation which effectually bars a prosecution of these defendants invoking its protection. The learned District Attorney contended that the limitation contained in Section

29b does not apply and claimed that the limitation imposed in Sec. 1044 of the Revised Statutes should govern. I cannot subscribe to this contention. In the absence of Section 29 of the Bankruptcy Act this Court would have no jurisdiction over the alleged crime set forth in the indictment. If Congress intended that Section 29d should apply only to the offenses specifically enumerated in the entire section, appropriate language, in my opinion, would have been adopted. For example, if subdivision 29d read "a person shall not be prosecuted for any of the foregoing offenses," etc., then the Government's claim would have some force but the subdivision in question reads in part "for any offense arising under this act." The alleged offense recited in the indictments necessarily arose out of the Bankruptcy Act and not under some other law of the United

States, hence the limitation found in Section 29d applies.
85-88 I therefore find that no lawful indictments were found against Herman H. Oppenheimer, Abraham Samuels, Charles Hepner and Ray Abrahams, or either of them within one year after the offenses alleged in the indictments, and that their prosecution is barred by Section 29b of the Bankruptcy Act. These indictments are therefore dismissed as to each and all of them.

Let an order to that effect be entered.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 1, 1914.

89

Order Quashing Indictment.

United States District Court, Southern District of New York.

No. 7-278.

UNITED STATES OF AMERICA, Plaintiff,
against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. Dietz, Charles Hepner, and Herman H. Oppenheimer, Defendants.

A motion to quash the indictment herein having been filed by the defendant, Herman H. Oppenheimer, and having duly come on to be heard before the Honorable William H. Pope, District Judge, on the 29th day of January, 1915;

Now, after reading the decision and opinion of Honorable William H. Pope, United States District Judge, dated January 29th, 1916, and filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, on February 2d, 1916, and the amended opinion of said Judge, it is

Ordered and adjudged, that the motion to quash made by the defendant, Herman H. Oppenheimer, be granted and the indict-

ment is hereby quashed and the defendants allowed to go without day thereunder.

Dated New York, February 26th, 1916.

AUGUSTUS N. HAND,
U. S. D. J.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Feb. 26, 1916.

90 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
HERMAN H. OPPENHEIMER et al.

Assignment of Errors.

The United States of America, in connection with its petition for a writ of error, makes the following assignment of Errors which it avers occurred in the decision of the Court herein sustaining defendant's motion to quash the indictment herein:

I. The Court erred in holding that the action of the Court in quashing the former indictments Nos. 2461 and 2462 were a bar to a re-indictment and prosecution upon a similar charge although the defendant had not been put in jeopardy under said former indictments.

II. The Court erred in describing its action as the granting of a motion to quash the indictment.

III. The Court erred in not describing its action as the sustaining of a special plea in bar.

IV. The Court erred in holding as a matter of law that the last overt act in the indictment herein, could not from its nature and did not legally constitute an overt act under the conspiracy alleged in the indictment.

V. The Court erred in not holding as a matter of law that the last overt act in the indictment herein did constitute an overt act under the conspiracy alleged in the indictment.

VI. The Court erred in holding as a matter of law that the indictment herein is legally identical with the indictments returned Nos. 2461 and 2462, which were dismissed by Judge Edwin F. Thomas, copies of which indictments and opinion are annexed hereto.

VII. The Court erred in sustaining the motion to quash the indictment.

VIII. The Court erred in not denying the motion to quash the indictment herein.

Wherefore the United States of America prays that the judgment of the said District Court of the United States for the Southern District of New York be, under the Act of Congress approved March

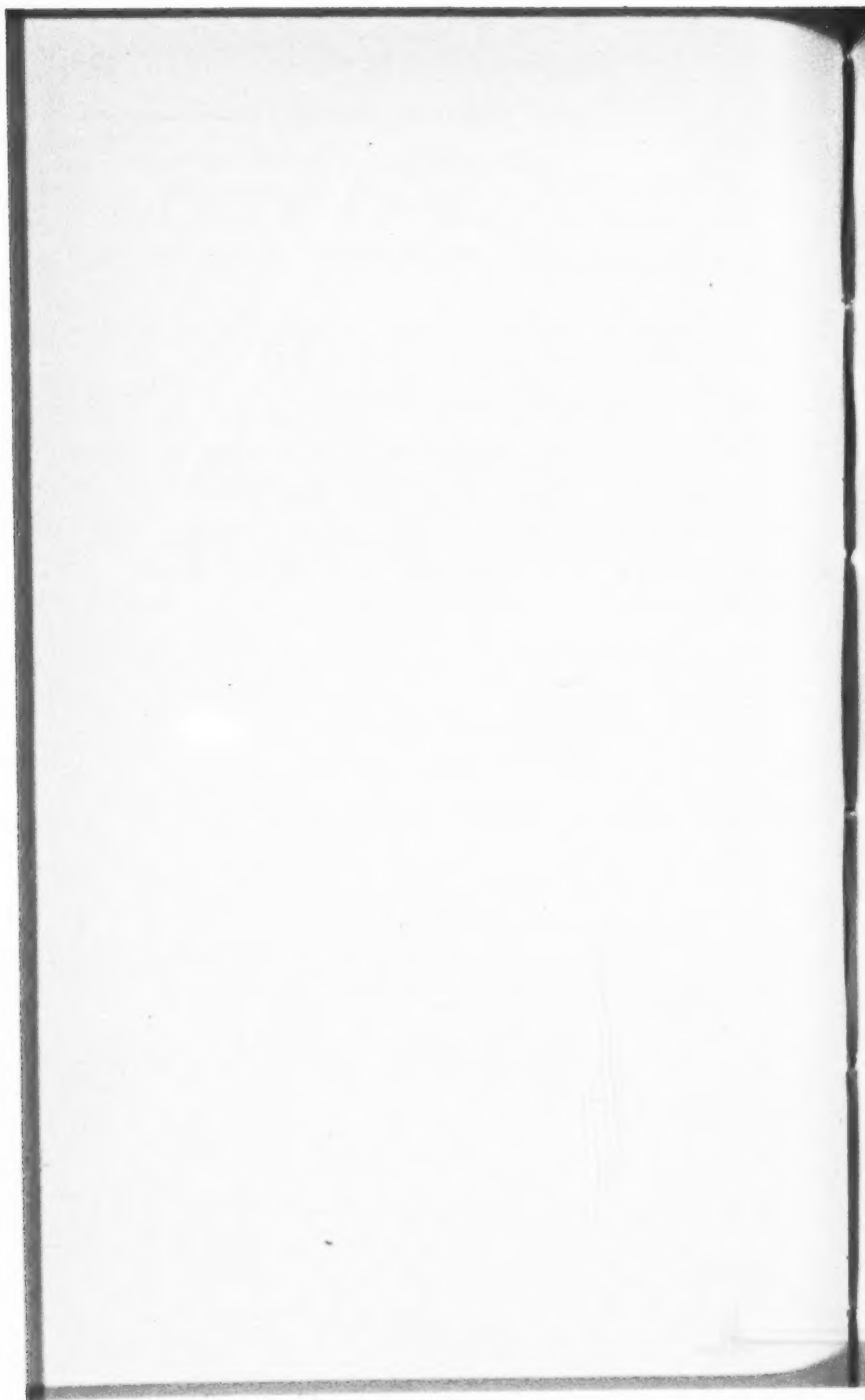
2nd, 1907, reviewed by the Supreme Court of the United States and said judgment be reversed.

H. SNOWDEN MARSHALL,
*United States Attorney for the
Southern District of New York.*

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Feb. 26, 1916.

93 [Endorsed:] 7-278. C-7-278. Form No. 336. U. S. District Court, Southern District of New York. United States of America versus Herman H. Oppenheimer et al. Citation. H. Snowden Marshall, United States Attorney, Attorney for U. S. Service of a copy of the within is hereby admitted. New York, Feb. 28, 1916. Kellogg & Rose, Attorneys for Def'ts. To Messrs. Kellogg & Rose, Attorney- for Def'ts, 116 Broadway, New York, N. Y. U. S. District Court, S. D. of N. Y. Filed Feb. 28, 1916.

Endorsed on cover: File No. 25,182. S. New York D. C. U. S. Term No. 899. The United States, plaintiff in error, vs. Herman H. Oppenheimer et al. Filed March 15th, 1916. File No. 25,182.



**ADDITIONAL
EXTRACT FROM TRANSCRIPT OF RECORD.**

OPINION OF POPE, J.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 899.412

THE UNITED STATES, PLAINTIFF IN ERROR,

v.s.

HERMAN H. OPPENHEIMER ET AL.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.**

FILED MARCH 15, 1916.

(25,182)



IN THE
District Court of the United States

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

JACQUES SAMUELS, JOSEPH
SAMUELS, ABRAHAM SAMUELS,
HERMAN J. DIETZ, CHARLES
HEPNER and HERMAN H. OP-
PENHEIMER,

Defendants.

No. 7-278.

Opinion.

The demurrer and the motion to quash filed by the several defendants proceed upon a number of grounds. All of these have been carefully examined.

The attack upon the regularity of the proceedings before the Grand Jury is found not to be well taken. Even if lack of evidence before a Grand Jury to justify the finding of an indictment con-

stitutes grounds for quashing it, the showing in support of the motion to quash is inadequate to show a lack of such evidence. None of the other grounds connected with the hearing before the Grand Jury are, in the light of well settled principles, sufficient to sustain the motion to quash.

Other features of the attack upon the indictment go to portions thereof, rather than the entire instrument, and for that reason cannot be considered.

The only ground which impresses the Court as serious as against the validity of the present indictment arises out of the following state of facts:

An indictment was found against these same defendants on February 24, 1914, which, in legal effect, is identical with the indictment here under consideration. This latter statement is made advisedly notwithstanding the fact that the present indictment, found December 21, 1914, contains an alleged overt act in addition to those set forth in the indictment of February 24th. In other respects the indictments are practically identical. An examination of the additional overt act alleged in the last indictment leads to the view that, notwithstanding certain conclusions of law therein set forth, the matters therein stated cannot, from their nature, constitute an overt act under the conspiracy alleged in each of the indictments. It follows, therefore, as stated above, that the two indictments are legally identical.

With this as a premise, the disposition made of the first indictment is material. The sufficiency of that was before Judge Thomas upon a motion to quash, and was decided by him on October 1, 1914 (which, of course, was in advance of any submission to or swearing of a jury). His decision

quashed the indictment and discharged the defendants thereunder. This decision proceeded upon the ground that the prosecution was barred by the Statute of Limitations. No appeal was taken by the Government from this decision, and thus from October 1, 1914, when the decision was rendered, until December 21, 1914, when this indictment was found, there was nothing pending against these defendants. Should the prosecution under this last indictment be allowed to proceed when there is outstanding a judgment in favor of the defendants to the effect that the Statute of Limitations has run against their alleged offense? The Government urges that this may be done, and further sets forth to the Court the fact that since the decision of Judge Thomas a decision of the Circuit Court of Appeals for this Circuit, as well as a decision by the Supreme Court of the United States, has shown that the Statute of Limitations did not run until three years after the offense instead of one year as held by him, and that his decision was thus erroneous. This latter, however, does not impress me as being of relevance provided the defendants have heretofore been heard upon this issue, have been discharged thereunder, and that judgment being unappealed from remains in force and effect. The decision of Judge Thomas in my judgment became the law of the case, and until reversed, protected the defendants from further prosecution arising upon the same state of facts. While, of course, were the case open to decision upon the question of limitation, the decision of the appellate courts would control, yet the law of the case having been settled previous to these decisions, the defendants should not be subjected to another prosecution while the judgment quashing the indictment and discharging

them still remains in force and effect. To hold otherwise is to subject the citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he should, until such decision is reversed, be allowed to go unmolested by another proceeding on the same charge.

An order will accordingly be entered quashing the indictment of December 21, 1914, and allowing the defendants to go without day thereunder.

This January 29, 1916.

WM. H. POPE,
U. S. District Judge.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR	} No. 899.
v.	
HERMAN H. OPPENHEIMER ET AL.	

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court during the next term.

On February 24, 1914, defendant in error Oppenheimer and certain other persons were jointly indicted in the District Court of the United States for the Southern District of New York for a conspiracy to commit an offense against the United States, to wit, to conceal assets from a trustee in bankruptcy prohibited by section 29-b of the Bankruptcy Act, in violation of section 37 of the Criminal Code. A demurrer and motion to quash was filed by said Oppenheimer on the ground *inter alia*, that the

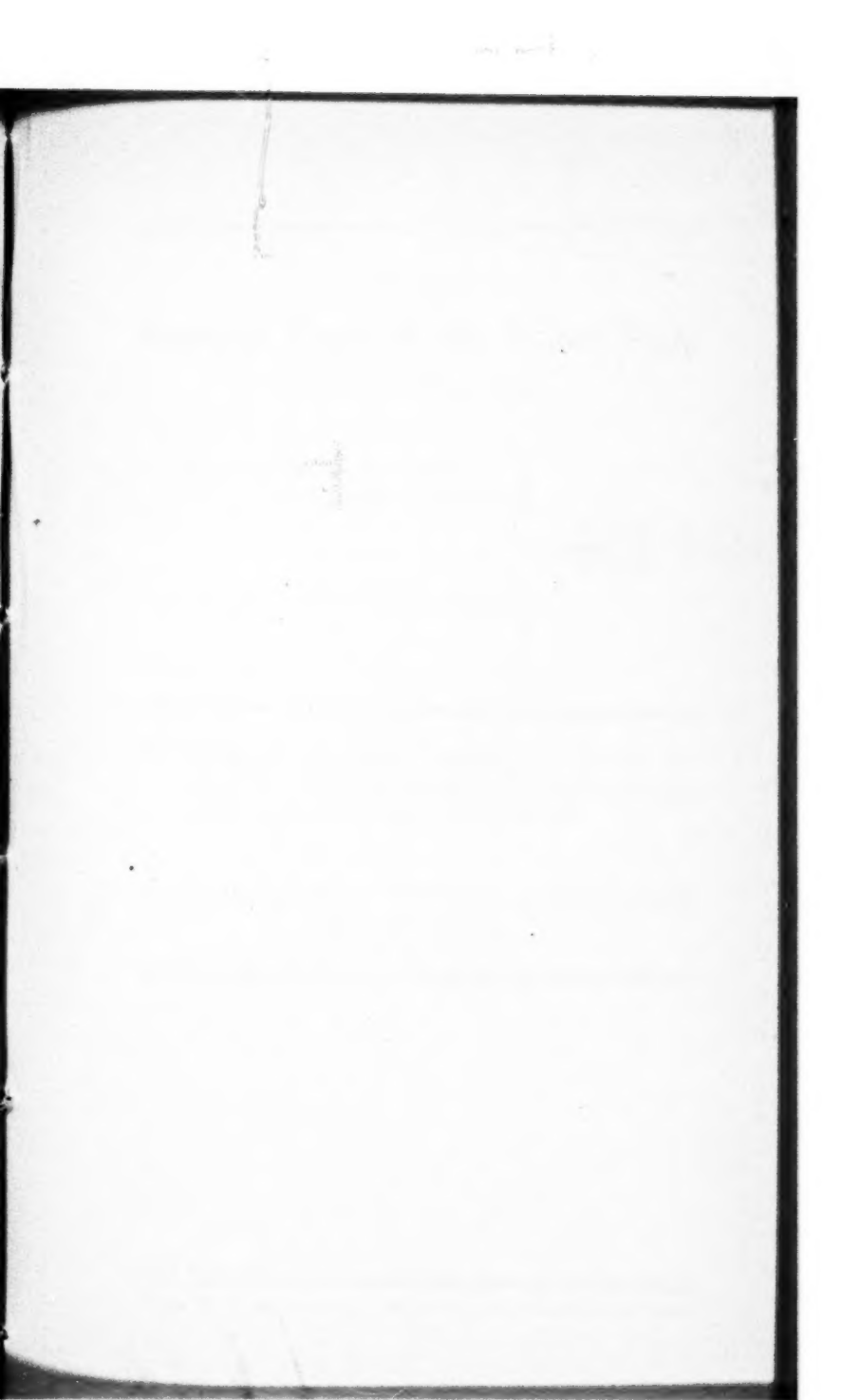
prosecution was barred by the Statute of Limitations contained in section 29-d of the Bankruptcy Act, and the district court entered judgment quashing the indictment as to defendant in error Oppenheimer and certain others on that ground. Thereafter this court in the case of *United States v. Rabinowich*, 238 U. S. 78, held that the limitation contained in the Bankruptcy Act did not apply to a conspiracy to commit an offense against that act.

On December 21, 1914, defendant in error Oppenheimer and others were again indicted in the same district court for the same crime. A demurrer and motion to quash the latter indictment upon the grounds *inter alia* (a) that the prosecution was barred by reason of the action of the court on the former indictments, and (b) that the prosecution was barred by reason of the Statute of Limitations contained in section 29-d of the Bankruptcy Act. The district court entered judgment quashing the subsequent indictment on the ground that the judgment on the first indictments was determinative of the case and protected defendants in error from further prosecution for the same crime.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

APRIL, 1916.



FILED

APR 15 1916

JAMES D. MAHER
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

THE UNITED STATES,
Plaintiff-in-Error,

vs.

HERMAN H. OPPENHEIMER,
et al.

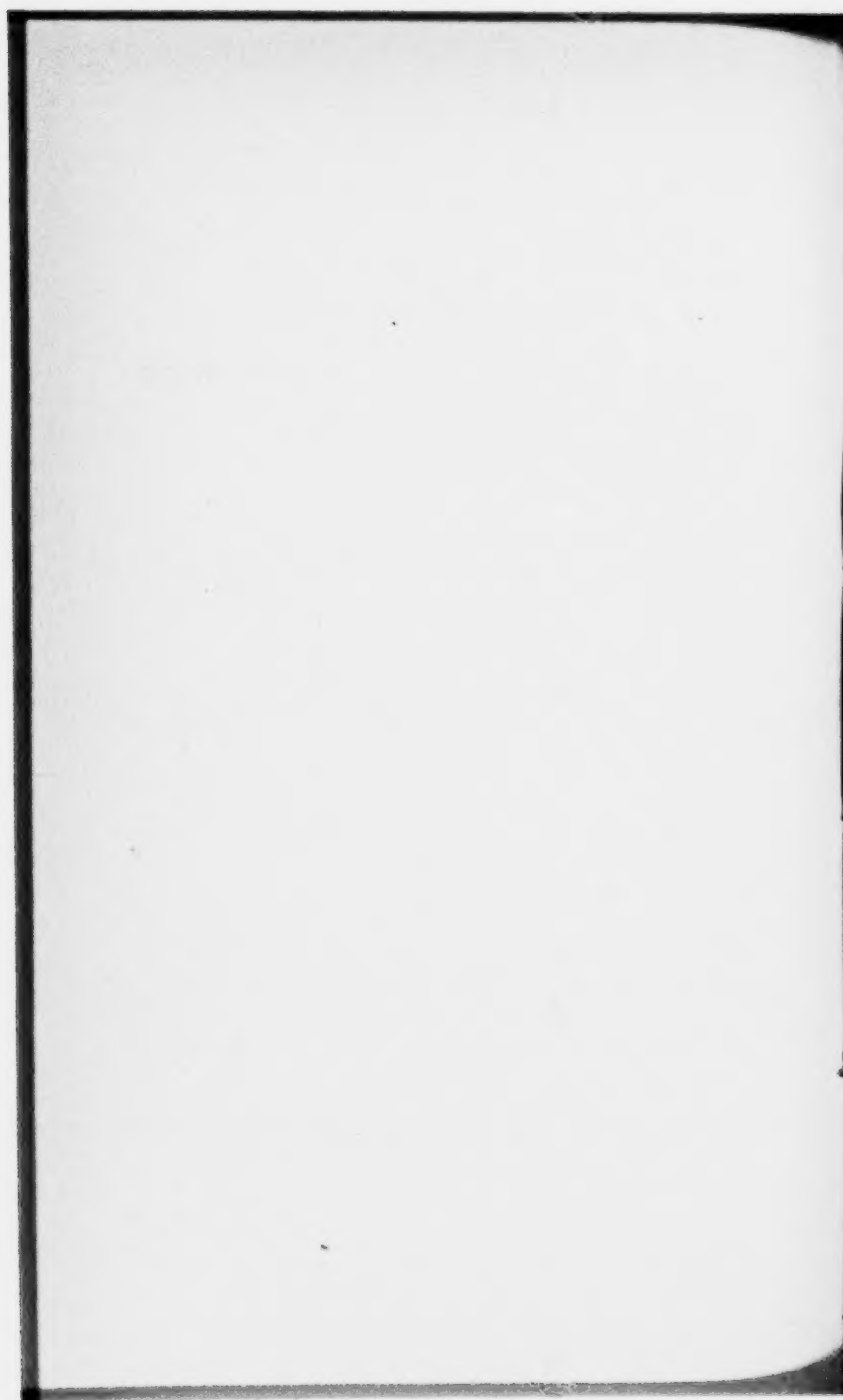
No.



412

IN ERROR TO THE DISTRICT COURT OF
THE UNITED STATES FOR THE SOUTH-
ERN DISTRICT OF NEW YORK.

MEMORANDUM IN OPPOSITION TO MOTION
TO ADVANCE.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

THE UNITED STATES, Plaintiff-in-Error, vs. HERMAN H. OPPENHEIMER et al.	}	No. 899.
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**MEMORANDUM IN OPPOSITION TO MOTION
TO ADVANCE.**

This is a motion to advance the above entitled cause for hearing during the next term of this court.

With the submission of this motion there will also be submitted a motion on behalf of defendant, Oppenheimer, to dismiss the appeal herein, on the ground, among others—that this Court has no jurisdiction of an appeal from an order quashing an indictment when no construction or interpretation of a statute was involved.

Criminal Appeals Act, 34 Stat., 1246.

(See numerous cases cited on brief to dismiss appeal submitted herewith.)

The present motion to advance admits the contention of the defendant-in-error on the motion to dismiss the appeal is justified to wit: that no statute was interpreted in the decision of the motion to quash, and if this is so then the motion to advance ought be denied and the appeal dismissed. The last five lines of this motion to advance reads:

"The District Court entered judgment quashing the subsequent indictment on the ground that the judgment on the first indictment was determinative of the case and protected the defendant in error from further prosecution for the same crime,"

which is an admission that no statute was construed in the order appealed from and the same paper admits that the order was made on a motion to quash. In other words the Court merely held that the law of the case having been settled as between the Government and this defendant by the decision on the former indictment, and that order having remained in full force and effect and never having been appealed from, the defendants could not while such order was in full force and effect be re-indicted for the same crime; irrespective of whether the former opinion was right or wrong the law of the case as between the Government and this defendant was settled by the final order in a Court of competent jurisdiction on the same matter between the same parties.

The opinion of the Court below (See ^{additional} record, ^{opinion} *Repe*)), SHOWS CLEARLY THAT THE JUDGE DID NOT INTERPRET ANY STATUTE AND DID NOT HOLD THAT THE STATUTE OF LIMITATIONS BARRED THE PROSECUTION.

The opinion shows just the opposite to wit; the court says if it were to construe the Statute it would have decided against the defendant, but that it would not and did not interpret or construe the statute.

The statement on page 2 of the motion to advance is misleading as the proper sequence should show that the defendant in error (Oppenheimer) was again indicted on December 21, 1914, the motion to quash heard January 30, 1915, and the opinion in United States vs. Rabinowich delivered June, 1915.

The statement as to the grounds of the motion to quash is also misleading. There were many grounds but the opinion of the Court and judgment was entered only on one ground that the law had been established as between the Government and the defendant, Oppenheimer, and the judgment establishing same had never been appealed from or reversed and remained the law of the case.

For the reasons herein stated and the brief on the motion of the defendant, Oppenheimer, to dismiss the appeal, and the admission in the motion of the United States to advance the cause, the appeal should be dismissed and the motion to advance should be denied.

Dated, April, 1916.

Respectfully submitted,

L. Laflin Kellogg
 Abram J. Rose
 Counsel for Deft. in Error

Office Supreme Court, U.

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MAR 30 1916

JAMES D. MAHER
CLERK

No. 899 412

Supreme Court of the United States

OCTOBER TERM, 1915

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

HERMAN H. OPPENHEIMER, *et al.*

HERMAN H. OPPENHEIMER,

Defendant in Error.

AFFIDAVIT AND NOTICE OF MOTION TO
DISMISS APPEAL.

L. LAFLIN KELLOGG,

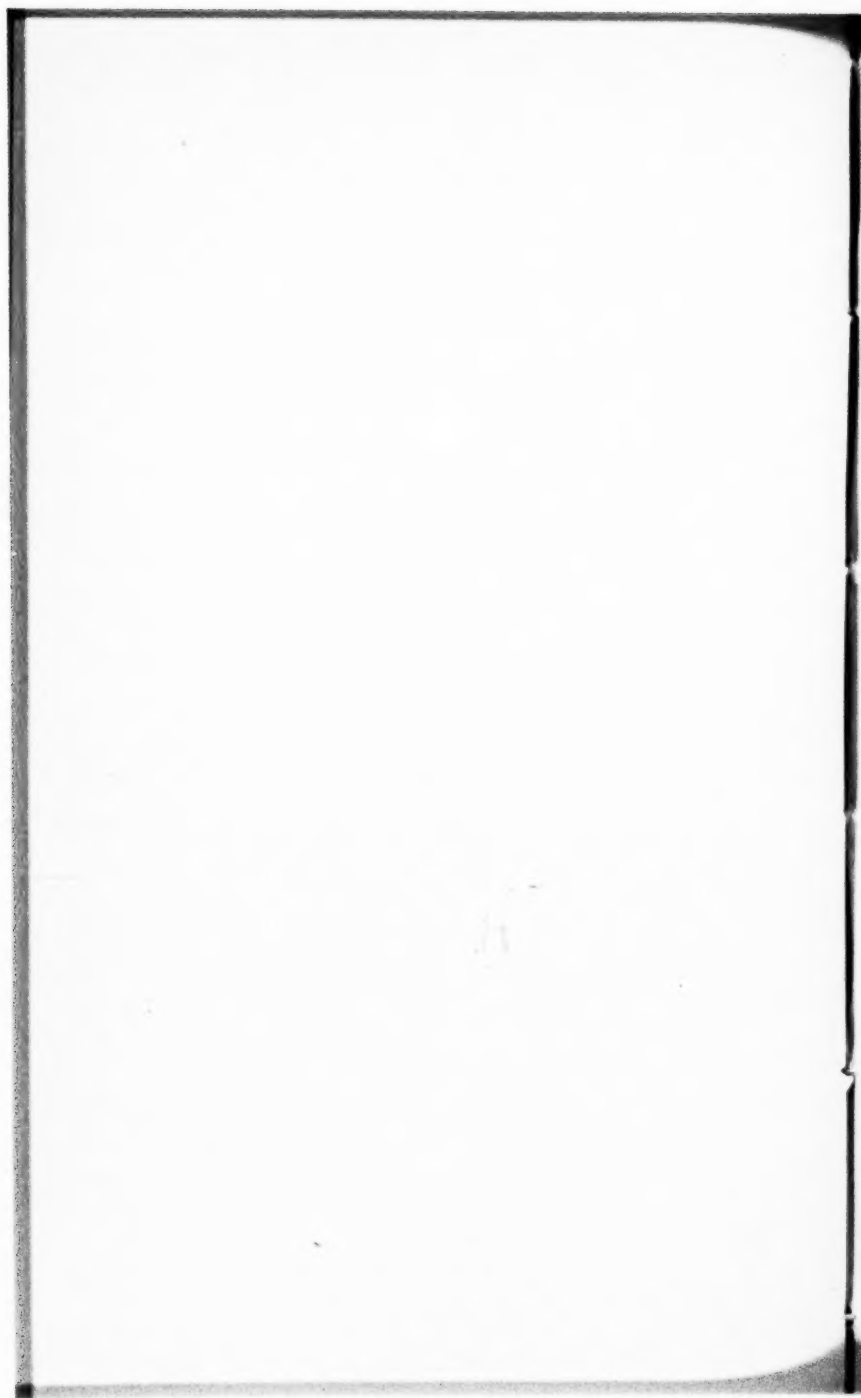
ABRAM J. ROSE,

Attorneys for Herman H. Oppenheimer,

Defendant in Error.

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IN THE SUPREME COURT OF THE UNITED
STATES.

UNITED STATES OF AMERICA,

against

HERMAN H. OPPENHEIMER,
et al.

No. 899.
October Term,
1915.

THE UNITED STATES OF
AMERICA,

Plaintiff,

against

JACQUES SAMUELS, JOSEPH
SAMUELS, ABRAHAM SAM-
UELS, HERMAN J. DIETZ,
CHARLES HEPNER and HER-
MAN H. OPPENHEIMER,
Defendants.

**MOTION TO DISMISS WRIT OF
ERROR AND APPEAL.**

AND, NOW COMES HERMAN H. OPPENHEIMER, the respondent above named, by L. Lafin Kellogg and Abram J. Rose, his counsel, and moves to dismiss the writ of error and the appeal taken herein by the above named United States of America on the ground that this Court has no jurisdiction of the same and that the said appeal and the writ of error and assignments of error and citation are defective and otherwise informal, irregular and insufficient and for other reasons apparent on the face of the record.

The two titles at the beginning hereof are the

IN THE SUPREME COURT OF THE UNITED
STATES.

UNITED STATES OF AMERICA,
Plaintiff in Error,

against

HERMAN H. OPPENHEIMER,
et al.

HERMAN H. OPPENHEIMER,
Defendant in Error.

Affidavit of Herman H. Oppenheimer.

THE UNITED STATES OF
AMERICA,
Plaintiff,

against

JACQUES SAMUELS, JOSEPH
SAMUELS, ABRAHAM SAM-
UELS, HERMAN J. DIETZ,
CHARLES HEPNER and HER-
MAN H. OPPENHEIMER,
Defendants.

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK, } ss.:
STATE, CITY AND COUNTY OF NEW YORK. }

HERMAN H. OPPENHEIMER, being duly sworn, de-
poses and says: That he resides in the State, City
and County of New York.

That he is the defendant in error herein.

That he, together with Jacques Samuels, Joseph Samuels, Abraham Samuels, Charles Hepner, Isaac Anderson, Herman J. Dietz and others were indicted for the same offense several times, as more fully is shown by the indictments in the record on appeal and also other indictments on record in the Court below and some not of record.

That the reason for two titles in this affidavit and the other papers submitted by defendant on this motion is—the first is the title in the writ of error, assignments of error and citation, while the second is the correct title in the case below.

That three of the indictments are printed in the record. That they all are legally identical and charge deponent with the same conspiracy in assisting the bankrupts to conceal assets from the trustee in bankruptcy.

That all of the indictments have either been quashed, dismissed or *nolle prosequed* by the District Court of this District.

That the two indictments numbered 6-333 and 6-334 being indictments Nos. 2461 and 2462 were on motion to quash ordered dismissed by Judge Thomas on October 1st, 1914, as more fully is shown by the opinion of Judge Thomas printed in the record on appeal.

That the time to appeal from the decision and judgment dismissing said indictments expired on November 1, 1914.

That on the said date and for some time thereafter deponent was not re-indicted. That the indictments dismissed by Judge Thomas were not dismissed because of any technical deficiency in the indictments themselves, or the record, but on a legal substantive point of law.

That thereafter on December 21, 1914, another indictment identical with those quashed by Judge Thomas was filed.

That thereupon deponent filed plea in bar, plea in abatement, motion to quash and demurrer to the said last indictment (See record) and the United States made two motions to strike said pleas from the files. (See record.)

Thereupon, by order of the court, the "plea in bar" and "plea in abatement" were withdrawn and the government never filed any demurrer or answer to either. The motion to quash and demurrer then came on for argument on January 30th, 1915. The government failed to file any answering affidavits or to make objection in any way to the form or contents of the motion to quash. The motion to quash was granted by Judge Pope, as more fully appears by his opinion, the simple ground thereof being that the indictment being identical with those quashed by Judge Thomas, and charging the same offense, the law of the case is established by the opinion of Judge Thomas, and never having been appealed from or reversed or set aside and the subject matter, i. e., conspiracy being the same and the parties the same the law remained the same, and that, in the language of Judge Pope, your defendant should not again be subjected to another prosecution while the judgment on the same charge still remains in force and effect and that to hold otherwise would be subjecting a citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he would until such decision is reversed be allowed to go unmolested by another proceeding on the same charge.

That by the determination of Judge Pope on the indictment on appeal, he did not construe any statute but on the contrary his opinion especially called attention to the fact that he did not construe a statute.

Deponent further says that the government filed no answering affidavits to the motion to quash.

That the government never raised any question before the court as to the nature, form or contents, or objected to it being heard as a "motion to quash," and never asserted it to be a "plea in bar."

Deponent further says that the parties to this proceeding were Joseph Samuels, Jacques Samuels, Abraham Samuels, Herman H. Oppenheimer, Isaac Anderson and Charles Hepner, and that the writ of error, the assignments of error, citation and other papers filed herein on appeal are entitled United States against Herman H. Oppenheimer, *et al.*, and omit all the names but Herman H. Oppenheimer, and are therefore defective and ought to be dismissed or stricken from the record.

Deponent further says that he has read the assignment and writ of errors and citation herein. That nowhere therein is there stated an error of the court below in quashing the indictment by construing or interpreting any statute, and deponent believes this court has no jurisdiction of the appeal unless such an error is assigned in the assignment of errors, and if the assignment of errors did contain such an error of the court below this appeal should be dismissed because it is clear, on the face of the record and the opinion of Judge Pope that there was no interpretation of the statute in the decision of this motion to quash which is the sole ground of the right given to the United States for an appeal by the law of March 2nd, 1907, 34 Stat. a L. 2564.

Deponent further says that he believes this court has no jurisdiction. That there is no right of appeal given to the United States by any statute which permits it to bring to this court the question of changing a motion to quash, to which no objection had been made below, to a "plea in bar" and that even as a plea in bar this court would have no jurisdiction since there is no construction of any

statute involved, as was said in this court in the case of *U. S. v. Kissel*, 218 U. S. 601, and many other cases cited in the brief.

HERMAN H. OPPENHEIMER.

Sworn to before me this }
21st day of March, 1916. }

CHAS. T. SMITH,
Notary Public,
[Seal] Queens Co., N. Y., 998.
Certificate filed in N. Y. Co., 41.

Office Supreme Court, U. S.

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No. [REDACTED] 412

Supreme Court of the United States

OCTOBER TERM, 1915.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

HERMAN H. OPPENHEIMER, *et al.*

HERMAN H. OPPENHEIMER, DEFENDANT IN ERROR.

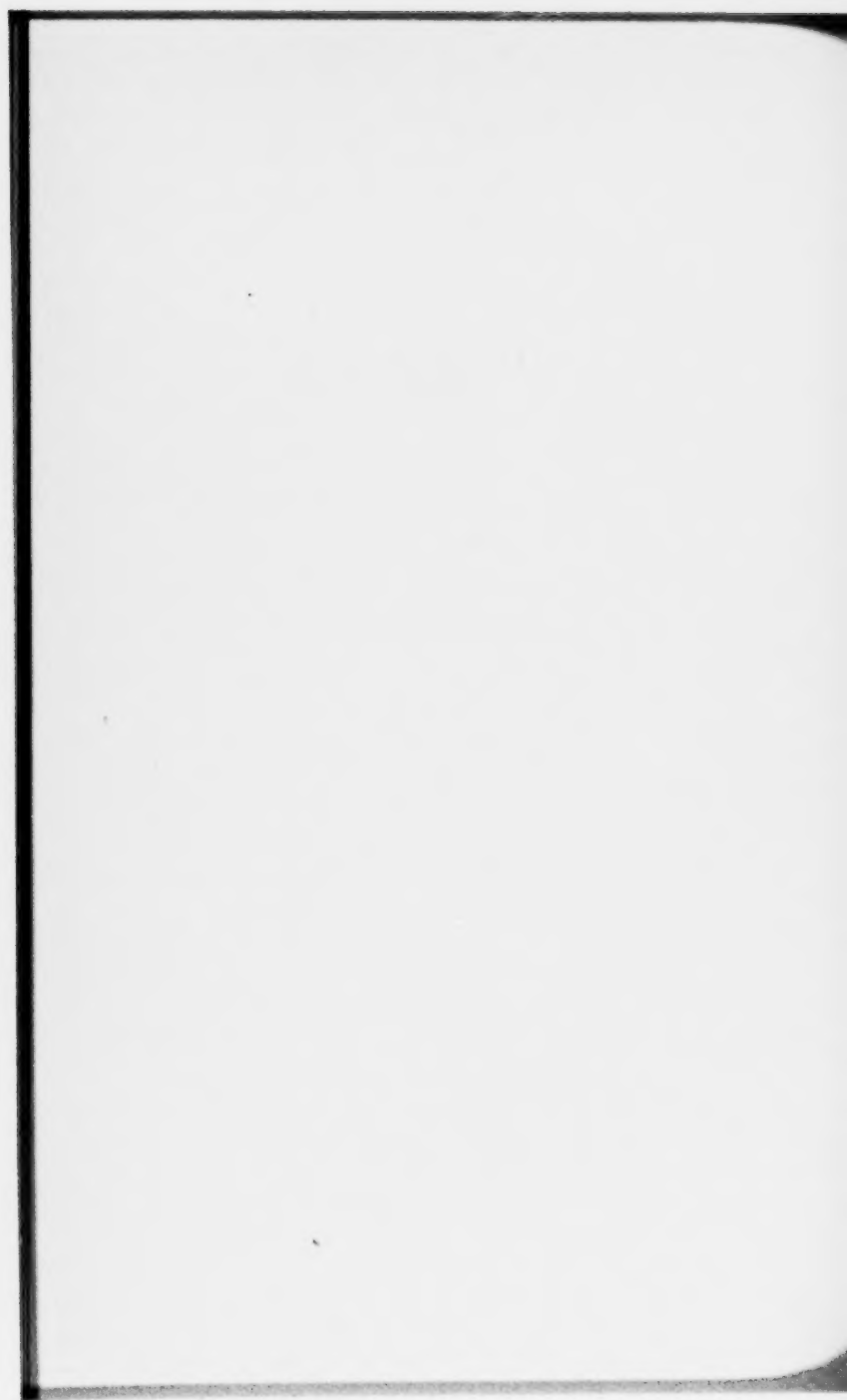
IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

On Motion to Dismiss.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

THE UNITED STATES,
Plaintiff-in-Error,
vs.
HERMAN H. OPPENHEIMER
et al.

No. 899.

IN ERROR TO THE DISTRICT COURT OF
THE UNITED STATES FOR THE SOUTH-
ERN DISTRICT OF NEW YORK.

MEMORANDUM ON INCOMPLETE RECORD
FOR MOTION TO DISMISS APPEAL.

The attention of the Court is respectfully directed to the omission in the record, printed for use of this Court on the motion to dismiss the appeal, of the opinion of Judge Pope in the Court below, which is the basis of the order on appeal and the motion to dismiss the appeal, although it forms part of the typewritten record, returned by the Clerk of the District Court.

Through an oversight, this opinion was left out when the record was printed, and as the opinion is the principal reason for the motion to dismiss the appeal, we have printed it under separate cover and marked it "Additional extract from Transcript of Record, opinion of Pope, J."

The importance of this omission must be explained, for in the record as printed, is an opinion on a former indictment (opinion by Thomas, J., page 23), and that opinion clearly interprets a statute; but the order entered thereon, October 1, 1914, was never appealed, while the order appealed from was entered on the opinion of Judge Pope (Record, page 25) on a later indictment, and it is asserted as the principal reason to dismiss the appeal, for it does not construe or interpret any statute in quashing the indictment, which is now on appeal.

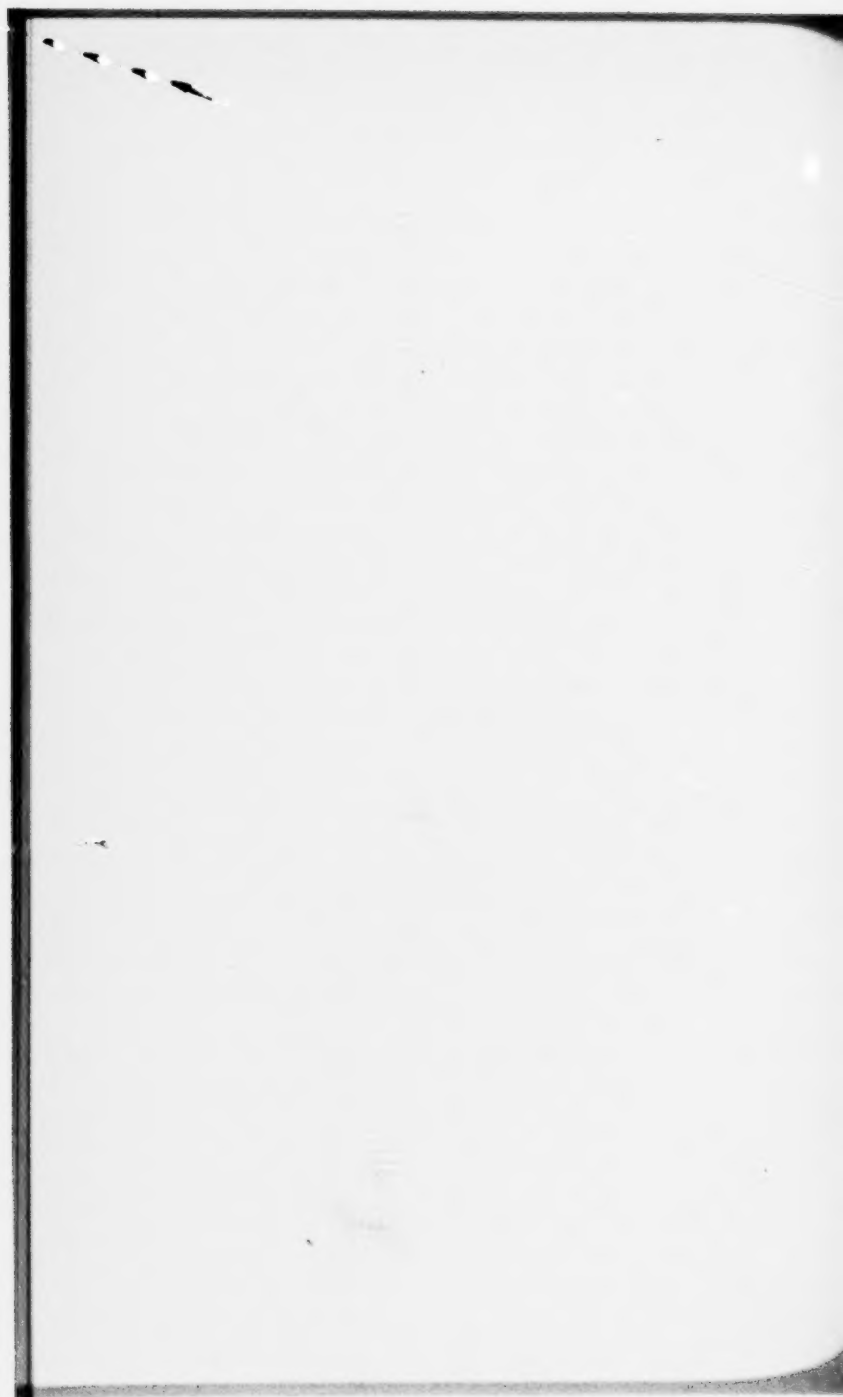
If this confusion is allowed to exist, it would necessarily direct the attention of this Court to the opinion of Judge Thomas in the record not in issue on this appeal, hence, our submission of the opinion of Judge Pope under separate cover.

Without going into detail, we merely add that it was through no error of defendant that the omission occurred.

Respectfully submitted,

L. Stephen Kellogg
Arthur D. Reese
Attorneys for Defendant





INDEX AND SUMMARY.

	PAGE
THE FACTS	1
THE STATUTES	4
SPECIFICATIONS OF ERROR.....	5
THE QUESTIONS INVOLVED.....	6
THE ARGUMENT	7
I. The Court below did not construe a statute	7
II. As an appeal from a decision or judgment on a motion to quash, this court has no jurisdiction because there was no construction or interpretation of any statute	7
Authorities directly in point.....	7
III. This Court has no jurisdiction to hear on appeal under laws 1907, C. 2564, whether a "motion to quash" can be held to be a "plea in bar".....	11
Authorities directly in point.....	12
IV. As an appeal from a decision or judgment on a "plea in bar" this court has no jurisdiction because it did not construe a statute	16
Authorities directly in point.....	17
V. The writ of error, alleged assignment of errors and citation are defective and insufficient to raise the only point appealable in such appeals as this, are too general, and are defective because they omit the names of some of the parties.....	19
Authorities directly in point.....	20

CASES CITED.

	PAGE
<i>Carlisle v. U. S.</i> , 194 Fed., 829.....	12, 17
<i>Clark v. Fredericks</i> , 105 U. S., 4.....	14
<i>Coffey v. United States</i> , 116 U. S., 436.....	13
<i>Craig v. Dorr</i> , 145 Fed., 307.....	20
<i>Davenport v. Fletcher</i> , 16 How., 142.....	21
<i>Deneale v. Archer</i> , 8 Pet., 526.....	21
<i>George v. Wallace</i> , 135 Fed., 286.....	20
<i>Goldsmith v. Koopman</i> , 152 Fed., 173.....	13
<i>Goodby v. Tuttle</i> , 154 U. S., 576.....	21
<i>Grand L. Ins. Co. v. Cooper</i> , 51 Fed., 332.....	15
<i>Hardy v. Wilson</i> , 146 U. S., 181.....	20
<i>Ireton v. Penn Co.</i> , 185 Fed., 84.....	20
<i>Jones v. U. S.</i> , <i>cr rel. Tompkins</i> , C. C. A., 135 Fed., 518	20
<i>Kaile v. Wettmore</i> , 6 Wall., 451.....	22
<i>Marine Bank v. Fulton Bank</i> , 2 Wallach, 252.	13
<i>Miller v. Mackenzie</i> , 10 Wall., 582.....	21
<i>Moore v. Simons</i> , 100 U. S., 145.....	22
<i>Mound City v. Castleman</i> , 171 Fed. 520.....	13
<i>Mussina v. Carazos</i> , 6 Wall., 355.....	21
<i>People v. Adams</i> , 176 N. Y., 351.....	13
<i>People v. Decker</i> , 157 N. Y., 186.....	14
<i>People v. Grosman</i> , 168 N. Y., 47.....	13
<i>People v. McDonald</i> , 159 N. Y., 309.....	14
<i>People v. Rice</i> , 159 N. Y., 400.....	14
<i>People v. Shulck</i> , 166 N. Y., 180.....	13
<i>People v. Tobin</i> , 176 N. Y., 278.....	17
<i>Simpson v. First Nat. Bk.</i> , 129 Fed., 257.....	20
<i>Smith v. Hopkins</i> , 120 Fed., 921.....	20
<i>Smythe v. Strader</i> , 12 How., 327.....	21
<i>Sterenson v. Barbour</i> , 140 U. S., 148.....	20

	PAGE
<i>The Protector</i> , 11 Wall., 82.....	22
<i>United States v. Biggs</i> , 211 U. S., 507.....	10
<i>United States v. Birdsall</i> , 233 U. S., 223.....	10
<i>United States v. Carter</i> , 231 U. S., 492....7, 13, 20	
<i>United States v. Forrester</i> , 211 U. S., 400.....	10
<i>United States v. Foster</i> , 233 U. S., 515.....	10
<i>United States v. Freeman</i> , 211 U. S., 525.....	10
<i>United States v. George</i> , 228 U. S., 14.....9, 12	
<i>United States v. Herr</i> , 211 U. S., 404.....	10
<i>United States v. Keitel</i> , 211 U. S., 370.....9, 18	
<i>United States v. Kissell</i> , 218 U. S., 601.....10, 17	
<i>United States v. Mason</i> , 213 U. S., 116.....	10
<i>United States v. Moist</i> , 231 U. S., 702.....	10
<i>United States v. Muscall</i> , 215 U. S., 26.....10, 12	
<i>United States v. Patten</i> , 226 U. S., 525.....	8
<i>United States v. Stevenson</i> , 215 U. S., 190....	10
<i>United States v. Sullenberger</i> , 211 U. S., 522..	10
<i>Van Stone v. Stillwell & B. Co.</i> , 142 U. S., 128.	20



In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Plaintiff in Error,

against

HERMAN H. OPPENHEIMER,
et al.

Case Number
899.

October Term,
1915.

THE UNITED STATES OF
AMERICA,
Plaintiff,

against

JACQUES SAMUELS, JOSEPH
SAMUELS, ABRAHAM SAM-
UELS, HERMAN J. DIETZ,
CHARLES HEPNER and HER-
MAN H. OPPENHEIMER,
Defendants.

The Facts.

This matter comes before this Court upon a writ of error from the United States District Court for the Southern District of New York to review an order of the said District Court, sustaining a motion to quash an indictment found December 21st, 1914.

The appeal is by the United States and is founded on the Criminal Appeals Act, March 2, 1907, C. 2564, 34 Stat. 1246.

The indictment was for conspiracy under Section 37, Criminal Code 5440, Rev. Stats.

H. H. Oppenheimer, who is the sole defendant here, was several times indicted with others for the same offence. (Record, pp. 3.9. 1.)

The earlier indictments were identical with the one now before the Court, charge the same offense and were dismissed by Judge Thomas October 1st, 1914, on motion to quash made by this defendant. The Government did not appeal from that decision or judgment. *See additional Record*

On December 21st, 1914, nearly two months after the time for the United States to appeal had expired, the defendant, with others, was again indicted for the same offense, the indictment being legally identical with those quashed previously by Judge Thomas (Record, p. 3.9) and defendants filed various pleas thereto. (Record, p. 27-23)

The United States then moved to strike out the pleas filed by defendant, Oppenheimer, on the ground that they were filed while the plea of not guilty still remained on record and the "plea in bar" and the "plea in abatement" filed by defendant here, Oppenheimer, were stricken off the record. (Record, p. 28-23)

Judge Pope then heard argument on the demurrer and motion to quash the indictment of December 21, 1914 (the United States Attorney having filed no affidavits in opposition) and granted same on the ground that the law, as promulgated by Judge Thomas, in the former decision and judgment as between the United States and this defendant not having been appealed from or reversed and the parties and subject matter (i.e., the offense) being the same, the indictment being legally identical with the one formerly quashed, the law of the case precluded a prosecution of the defendant on an indictment legally identical with those quashed by Judge Thomas, and charging the same offense.

The record shows that no objection was raised in the court below by the United States that the "motion to quash" was a "plea in bar" or that the United States treated the "motion to quash" as a "plea in bar." The Government failed to file the usual demurrer or answer in opposition to a "plea in bar" and the matter was heard and decided as a "motion to quash." (See affidavits, notice of motion; opinion of Judge Pope and order thereon, Record, pp. 14, 19, 25 *and Additional Record*.)

The United States then appealed from the "order" of Judge Pope and filed and served a writ of error, assignments of errors and citation, and made the defendant, Oppenheimer, the sole defendant on this appeal. (See Record, pp. 1-3, 25.)

The opinion of Judge Pope quashed the indictment and allowed the "defendants" (plural) to go without day thereunder. (See *Additional Record*, p. 4.)

The only basis in law for this appeal, if any, is the Criminal Appeals Act set forth herein, which gives to the United States the right of appeal only when a statute was construed by the Court below.

The title of the writ of error, the assignment of errors, and the citation do not contain the names of all the parties defendant, as required by law. (Record, p. 3 26)

NOWHERE IS THERE AN ASSIGNMENT OF ERROR ALLEGING THAT THE COURT BELOW ERRED IN CONSTRUING A STATUTE. (Assignment of Errors, p. 4 this brief.)

No statute was construed by the Court below.

The defendant, Oppenheimer, the only one as to whom an appeal was taken, has made this motion to dismiss the appeal the writ and assignment of errors on appeal, on the grounds: A—THAT THIS COURT HAS NO JURISDICTION HEREIN OF THIS APPEAL UNDER THE CRIMINAL APPEALS ACT, AND B—THAT THE WRIT AND ASSIGNMENT OF ERRORS, CITATION AND ORDER DO NOT RAISE AN APPEALABLE QUESTION; C—DO NOT CONTAIN THE NAMES OF ALL THE PARTIES, AND ARE IN OTHER RESPECTS DEFECTIVE.

Statute Involved.

The Criminal Appeals Act of March 2nd, 1907, C. 2564, 34 Stat. 1246:

“That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From a decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.”

Specifications of Error.

I. The court erred in holding that the action of the Court in quashing the former indictments Nos. 2461 and 2462 were a bar to a re-indictment and prosecution upon a similar charge although the defendant had not been put in jeopardy under said former indictments.

II. The Court erred in describing its action as the granting of a motion to quash the indictment.

III. The Court erred in not describing its action as the sustaining of a special plea in bar.

IV. The Court erred in holding as a matter of law that the last overt act in the indictment herein could not from its nature and did not legally constitute an overt act under the conspiracy alleged in the indictment.

V. The Court erred in not holding as a matter of law that the last overt act in the indictment herein did constitute an overt act under the conspiracy alleged in the indictment.

VI. The Court erred in holding as a matter of law that the indictment herein is legally identical with the indictments returned Nos. 2461 and 2462, which were dismissed by Judge Edwin F. Thomas, copies of which indictment and opinion are annexed hereto.

VII. The Court erred in sustaining the motion to quash the indictment.

VIII. The Court erred in not denying the motion to quash the indictment herein.

The Questions Involved.

This motion presents the following questions:

1. Has this court jurisdiction to hear an appeal from an order entered on a motion to quash when there was no statute construed under the Criminal Appeals Act, March 2nd, 1907, Chap. 2564, 34 Stat. 1246?

2. Is a writ of error, assignment of error and citation defective: a—When it does not contain all the names of the defendants; b—When it does not specifically raise a question appealable to this Court; c—When it is too general.

There is a secondary question involved; has this Court under the statute cited in the first question, jurisdiction to hear an appeal for the purpose of determining whether a motion to quash was really a plea in bar when the proceedings in the Court below were based on affidavits and notice of motion in a "motion to quash," argued and decided and an order entered thereon as such without any objection or exception on the part of the United States to the form or the contents thereof and without raising the question below that the same was improper or a plea in bar.

Defendant contends that this Court has no jurisdiction to hear an appeal from an order on a motion to quash an indictment unless a statute was construed or interpreted in the Court below, and then to hear such appeal only on the question, was the statute properly construed in the Court below.

The second contention of the defendant is that the writ, assignment of errors, and citation are defective.

THE ARGUMENT.

POINT I.

The Court below did not construe a statute.

The opinion of Judge Pope in the Court below is so clear that the Court did not construe a statute that we merely submit the opinion to sustain this point. (Record, p. 14.)

Additional

POINT II.

As an appeal from a decision or judgment on a motion to quash, this Court has no jurisdiction because there was no construction or interpretation of any statute.

The opinion of Judge Pope clearly bears out our contention that the Court did not construe a statute and especially avoided any construction of any statute and shows there was no necessity for the construction of a statute. It is clearly founded on basic law only—the law of the case.

This Court, has repeatedly held it will not go into constructions of indictments, overt acts, similarity, errors of law, or matters of discretion *unless a statute is involved* on appeals under Act of March 2d, 1907.

In the case of *United States v. Carter*, 231 U. S., 492, appeal dismissed by this Court, the demurrer was upheld in the Court below because certain counts were "bad in law." This Court refused, however, to examine the whole case to see if any statute

was interpreted or construed and said, by Mr. Chief Justice White, page 493:

"It is settled we cannot revise the mere interpretation of the indictment and are confined to ascertaining whether the Court erroneously construed the statute and our power to revise can alone rest upon the theory that what was done amounts to a construction of the statute. (*Keitel* case, 211 U. S., 371; *Stevenson*, 215 U. S., 190), but it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment."

The facts in the case at bar are more favorable to defendant. In the *Carter* case the Court below did not write an opinion yet, this Court refused to look into the counts of the indictment to ascertain whether there had been an interpretation of a statute, *while in this case the written opinion shows clearly that the Court did not construe or interpret any statute.*

In *United States v. Patten*, 226 U. S., 525, at page 535, Mr. Justice Van Devanter states:

"The limitation upon our jurisdiction under the criminal appeals act are such that we must accept the Circuit Court's construction of the counts and consider only whether its decision that the acts charged are not condemned as criminal by the anti-trust act is based upon an erroneous construction of that statute."

In *United States v. George*, 228 U. S., 14, Mr. Justice McKenne, delivering the opinion of this Court, states, at page 19:

"This statute (Act of March 2, 1907, C. 2564, 34 Stat., 1246) seems to require an explicit declaration of the law upon which an indictment is based and a ruling on its validity or construction. To contend for one law as applicable in the trial Court and another law in the Appellate Court would seem not only to be opposed to the requirement of the statute but to be inconsistent with orderly procedure and to confound the relation of trial and appellate tribunals."

United States v. Keitel, 211 U. S., 370, Mr. Justice White, delivering the opinion of the Court, in discussing the Criminal Appeals Act, Laws of March 2, 1907, C. 2564, 34 Stat. at L. 1246, the law here involved, says, at page 386:

* * * "The construction of the statutes, therefore, is the real question for decision." * * *

and on page 398:

"That act, we think, plainly shows that in giving the United States the right to invoke the authority of this Court by direct writ of error in the cases for which it provides contemplates vesting this Court with jurisdiction only to review the particular questions decided by the Court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to review of decisions of the lower Court concerning the subjects embraced within the clauses of the statute and not to open here the whole case.

"We think this conclusion arises not only

because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions enumerated in the statute but also because of the whole context which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute leaving all other question to be controlled by the general mode of procedure covering the same, etc., etc. * * *."

See also quotation from *U. S. v. Kissel*, on page 17 of this brief.

All the cases in this Court are to the same effect, that this Court will "not open the whole case here," as said in the *Keitel* case, or go into any thing except a decision clearly interpreting a statute.

The aforesaid opinions have been followed in every case in this Court. See:

U. S. v. Biggs, 211 U. S., 507, pp., 518-522.

U. S. v. Sullenberger, 211 U. S., 522.

U. S. v. Forrester, 211 U. S., 400.

U. S. v. Herr, 211 U. S., 404.

U. S. v. Freeman, 211 U. S., 525.

U. S. v. Mason, 213 U. S., 116.

U. S. v. Muscall, 215 U. S., 26.

U. S. v. Stevenson, 215 U. S., 190.

U. S. v. Kissel 218 U. S., 601.

U. S. v. Moist, 231 U. S., 702.

U. S. v. Birdsall, 233 U. S., 223-230.

U. S. v. Foster, 233 U. S., 515-523.

THE OPINION OF THE COURT BELOW IS SO CLEAR THAT IT DID NOT CONSTRUE A STATUTE, WE SUBMIT IT WITH THE CASES CITED, AS THE VERY BEST ANSWER TO THIS APPEAL, AND THE REASON FOR THIS COURT'S LACK OF JURISDICTION, AND GROUND FOR ITS DISMISSAL.

POINT III.

This Court has no jurisdiction to hear an appeal under Laws 1907, C. 2564, whether "a motion to quash" can be held to be a "plea in bar," especially when that point was not raised in the Court below.

This point, referring to assignment of errors II and III, is clearly covered by the long line of decisions in this Court following the case of *United States v. Keitel, supra*, for this question would certainly not involve the construction of any statute but on the contrary would directly involve the construction of a pleading, and that pleading not even the indictment.

The United States evidently attempts, by these two assignments of error to now raise the question for the first time,—was this "motion to quash" not a "plea in bar" so as to bring it within the fourth clause of the Act of March 2, 1907, giving a right to appeal to the United States on a "plea in bar"?

The record is barren of any showing that the question was raised below. Can it now be raised? The decisions of this Court holding that a question not raised below cannot be raised in this Court for the first time are many and the opinion of this Court in *U. S. v. George, supra*, is clearly to this effect. In effect will the United States be allowed to argue a motion to quash with the law applicable thereto and after decision against it come to this Court, and here for the first time, claim the "motion to quash" is a "plea in bar" and thereby obtain an appeal? This question is answered by the following, among numerous cases:

Carlisle v. United States, 194 Fed. at 829, CCA., GUFF, J., speaking for the Court, after stating that no exception was taken below on the ruling of the Court on a "motion to quash," says:

"The object of an exception is to challenge the correctness of the Court's ruling, and to permit the trial judge, when his attention has been specially called to the alleged error, to correct his disposition of the matter, should he deem it proper to do so, and in case he does not do so to provide a method for review in the Appellate Court. SUCH AN EXCEPTION IS ABSOLUTELY INDISPENSABLE UNDER THE PRACTICE IN THE UNITED STATES COURTS." (Capitals ours.)

In *United States v. Muscall*, 215 U. S., 26, *supra*, Mr. Justice Brewer, in delivering the opinion of this Court on a similar appeal, says, at page 31:

"But our inquiry is limited to the particular question decided by the Court below."

Mr. Justice McKenna in *United States v. George*, *supra*, on page 19, in a similar situation, says:

* * * "To contend for one law as applicable in the trial Court and another law in the Appellate Court would seem not only to be opposed to the requirement of the statute but to be inconsistent with orderly procedure and to confound the relation of trial and appellate tribunals."

IF ANYTHING DIFFERENT THAN A MOTION TO QUASH, THEN THIS WAS A MOTION TO DISMISS. But the form of pleading

res adjudicata is immaterial so long as the necessary facts appear in the plea.

In *United States v. Carter*, 231 U. S., at page 493, Mr. Justice White says:

"To suggest that if the mere form in which a ruling is clothed be made the test of the power to review it will result that the exertion of the authority may be rendered unavailing in every case is without foundation. It is not to be assumed that trial courts will not seek rightfully to discharge their duty * * *."

(Foster's Federal Practice, p. 669, Sec. 187.)

Mound City Co. v. Castleman, 171 Fed., 520.

It is too late on appeal to object to the form of the pleading below when the objection was not raised there. (Foster's Federal Practice, 2546.)

Marine Bank v. Fulton Bank, 2 Wallach, 252, at 258.

Coffey v. United States, 116 U. S., 436.

Goldsmith v. Koopman, 152 Fed., 173.

People v. Adams, 176 N. Y., 351, affirming 35 App. Div., 390.

And this is so where an exception was not reserved below, even in capital cases in New York:

People v. Tobin, 176 N. Y., 278.

People v. Grosman, 168 N. Y., 47.

and even when constitutional question is involved:

People v. Shulck, 166 N. Y., 180.

and especially so when a point of law is raised :

People v. McDonald, 159 N. Y., 309.

People v. Rice, 159 N. Y., 400.

People v. Decker, 157 N. Y., 186.

Clark v. Fredericks, 103 U. S., 4, Mr. Chief Justice Waite, on page 5, says :

"The matter referred to in the second assignment does not seem to have been brought to the attention of either of the Courts below and the objection now made comes too late in this Court for the first time. If the defect complained of had been specifically pointed out to the District Court, when the findings were filed, it would no doubt have been corrected. There is nothing in all this very confused record to indicate that the point was ever made until the brief for the plaintiffs in error was filed here."

All parties and the Court treated the matter as a "motion to quash" in the Court below.

The United States Attorney never treated this as a "plea in bar" in the Court below—never raised the point below that the "motion to quash" was a "plea in bar" and should be estopped from raising it here even if this Court had jurisdiction to determine it.

To now hold that this was a plea in bar below would be giving a new right of appeal to the United States—the right to have construed in this Court any and all pleadings, demurrers, pleas in abatement, pleas of former jeopardy, *res adjudicata*, arrest of judgment, jurisdiction, *nole*, *contendere*, special plea of statute of limitations, plea of insanity, motions to quash or any form of plea so

as to give the government an appeal by merely claiming on appeal that it was a "plea in bar."

To carry the claim of the U. S. to its conclusion *EVERY FORM OF PLEA IS APPEALABLE TO THIS COURT*, because *EVERY PLEA* except *GUILTY OR NOT GUILTY IS A "BAR" TO THE INDICTMENT IN QUESTION, HENCE EVERY "PLEA" MUST BE A "PLEA IN BAR."* WE SUBMIT THIS COURT WILL NOT ADOPT SUCH SPECIOUS REASONING.

In the case at bar this theory becomes even harsher. The record shows (pages 20-23) that defendant filed a "plea in bar" which was withdrawn from the record, but the "motion to quash" remained on record and was argued and decided. How can it now be held to be his "plea in bar," when that was withdrawn?

Grand L. Ins. Co. v. Cooper, C. C. A. 51 Fed., 332-335.

"An Appellate Court will not hold that the Court below erred in the interpretation of its own order, unless it is clear that injustice resulted."

When a defendant files a plea in bar the United States must either demur to it or answer, but neither was done by the United States in these proceedings—how can the appellant now have judgment?

The decision was really "*res adjudicata*," a defense which can be set up at any time in any plea or in a special plea without other name. In fact it can be of the Court's own motion at any time, when the law may come to its attention. It is something as important as the just and proper administration of law itself and is founded on that broad principal implied by the Court below when

the Judge in his opinion said ^{Additional} (see Record, p. 3):

"* * * the defendants should not be subjected to another prosecution while the judgment quashing the indictment and discharging them still remains in force and effect. To hold otherwise is to subject the citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he would, until such decision is reversed, be allowed to go unmolested by another proceeding on the same charge."

It is earnestly submitted therefore that this appeal must be considered, if at all, as an appeal from that which the pleading itself, the Judge who wrote the opinion, the Judge who signed the order and the writ and assignments of error sets it out to be—and the parties treated it—based on an order made on a "motion to quash."

BUT, EVEN AS AN APPEAL ON A DECISION OR JUDGMENT ON A PLEA IN BAR WE WILL SHOW THAT THIS COURT HAS NO JURISDICTION THEREOF.

POINT IV.

As an appeal from a decision or judgment on a "plea in bar" this Court has no jurisdiction because it did not construe a statute.

The law of 1907, March 2, 1907, while it separates "pleas in bar" when the defendant has never been put in jeopardy from the "motions to quash," etc., there are two good reasons for this separation.

Plea in bar, through former jeopardy, does not necessarily involve the interpretation of a statute

and it was intended to give the United States this added right to appeal to those involved in decisions on demurrers, motions to quash and pleas in abatement, when defendant had not been put in jeopardy.

The second reason evidently was that "pleas in bar" which do not raise the plea of former jeopardy and are not constructions of a statute are practically unknown.

In *Carlisle v. United States*, 194 Fed., 829, Judge Goff said:

"A motion to quash is addressed to the discretion of the Court, and will never be reviewed in an Appellate Court save only in cases where there has been such a failure to properly exercise the judicial discretion as to cause real injustice."

To give any other interpretation to that part of the Criminal Appeals Act relating to "pleas in bar" than that stated at the head of this Point would be to emasculate the entire act and give the government an appeal in every plea, for, as heretofore pointed out, every "plea" when sustained is a "bar" and under any other construction every "plea" becomes a "plea in bar" and appealable.

However, this Court has determined this point in the case of *United States v. Kissel, supra*, in which Mr. Justice Holmes, delivering the opinion of the Court, concurred in by all the Justices, on page 606, says:

"We deem it unnecessary to state the pleadings with more particularity because the only question before us under the Act of March 2d, 1907, C. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this Court is confined to a considera-

tion of the grounds of decision mentioned in the statute when an indictment is quashed was considered in *United States v. Keitel*, 211 U. S., 370, 399.

WE THINK THAT THERE IS A SIMILAR LIMIT WHEN THE CASE COMES UP UNDER THE OTHER CLAUSE OF THE ACT, FROM A JUDGMENT SUSTAINING A SPECIAL PLEA IN BAR WHEN THE DEFENDANT HAS NOT BEEN PUT IN JEOPARDY. THIS BEING SO, WE ARE NOT CONCERNED WITH THE TECHNICAL SUFFICIENCY OR REDUNDANCY OF THE INDICTMENT OR EVEN IN THE VIEW THAT WE PRESENTLY SHALL EXPRESS, WITH CONSIDERATION OF THE NATURE OF THE OVERT ACTS ALLEGED." (ITALICS ours.)

On the authority of this case alone we submit this appeal should be dismissed.

And in the *Keitel* case, *supra*, as well as the long line of decisions which follow, already set forth, the language is too clear to need elaboration that this Court on appeals of this kind is restricted to the sole question, did the Court below construe a statute in quashing the indictment?

We therefore submit that as an appeal from a "plea in bar" this Court has no jurisdiction in this case since no statute was construed.

POINT V.

The Writ of Error, Assignment of Errors and Citation are defective and insufficient to raise the only point appealable in such appeals as this, are too general, and are defective because they omit the names of some of the parties.

They fail to state or raise the only point which would give this Court jurisdiction, i.e., that the Court below construed a statute.

They fail to give the names of all the parties.

They are too general under the decisions.

In order that this Court may have jurisdiction the writ of error must contain words to the effect, "that the Court erred in the interpretation, construction or invalidity of a statute by, etc., etc.," for this is the only ground on which this Court will uphold jurisdiction of this appeal under all the cases reported.

None of the errors assigned raise this question and the decision of the Court below clearly shows that no statute was construed *and that may be the reason the United States purposely did not assign that error.*

This seems so evident from a reading of the assignments of error and the opinion that we refrain from taking up each assignment of error separately, except to say that the only two which might be asserted to include such an idea are numbered I and VII, and as to these two, the words are missing and the interpretation thereof to raise the necessary question means that this Court will do what it has repeatedly announced it will not do, to wit, look through and open the entire case to ascertain whether a possible error had been committed which would give this Court jurisdiction when it is not distinctly raised in the writ and assignment of error and the opinion shows to the contrary.

And this was held so even where the party's firm name was stated instead of individually:

"The Protector," 11 Wall., 82.

Moore v. Simons, 100 U. S., 145.

and where the writ of error omitted the parties named in the citation the Court dismissed the writ, although in this case the citation is also defective.

Kaile v. Wettmore, 6 Wall., 451.

Therefore, no question is raised by the assignment of error which would give jurisdiction to this Court and it is too general and the writ of error, assignments and citation being defective in not containing the names of the various defendants, and too general to raise an appealable question on an appeal like this from an order quashing an indictment, the writ of error and the appeal should be dismissed.

The anomolous situation now presented is, an opinion has been filed quashing the indictment as to the "defendants" (see ^{adoptional} Record, p. 4) and the Clerk has so entered on the docket and indictment (see Record, p. 23), yet here only one defendant is prosecuted on this appeal (the charge being conspiracy), which appeal if successful would not affect the others while, if unsuccessful, the United States can appeal as to each of the other defendants separately, and if successful can then again indict this defendant.

THE MOTION TO DISMISS SHOULD BE GRANTED because:

First—The Writ of error, the assignment of errors and the citation do not contain the names of all the parties, and the assignments of error are too general.

Second—The assignment and writ of error do not clearly raise the only question which would give this Court jurisdiction under the Criminal Appeals Act, i.e., "That the decision or judgment appealed from wrongly construed, interpreted or was based on the validity of a statute.

Third—Because this Court will not entertain an appeal from an order on a "motion to quash" to determine whether it was in fact a motion to quash or something else, as this Court has no jurisdiction to reverse errors of law under the Criminal Appeals Act unless a statute is involved, and at most the determination by the Court below that it entertained and decided a "motion to quash" would be error of law without interpretation of a statute, and the United States having treated the matter as a motion to quash in the Court below without objection or exception, it is now estopped from asserting it to be a "plea in bar."

Fourth—Considering this as an appeal on a decision or judgment on a "plea in bar" this Court has no jurisdiction under the Criminal Appeals Act because it does not involve the interpretation of a statute, and finally,

Fifth—BECAUSE AS AN APPEAL FROM A DECISION OR JUDGMENT ON A "MOTION TO QUASH" THIS COURT HAS NO JURISDICTION BECAUSE IT APPEARS PLAINLY BY THE ENTIRE RECORD AND THE OPINION BELOW THAT NO STATUTE WAS INTERPRETED.

Respectfully submitted,

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ABRAM J. ROSE,

Attorneys for Defendant-in-Error.

INDEX.

	Page.
THE FACTS	1-3
ARGUMENT	4-18
I. The so-called motion to quash filed by the defendant is in fact and in law a special plea in bar. The designation given to his pleading by a defendant can not change its essential nature. This court will disregard the misnomer and act upon the fact.....	4-14
<i>United States v. Adams Express Co.</i> , 229 U. S. 381.	
<i>United States v. Barber</i> , 219 U. S. 72.	
II. A decision upon a special plea in bar when the defendant has not been put in jeopardy is subject to review here whether or not it involves the construction of the statute upon which the indictment is based.....	14-16
III. The order of the court entered upon the motion to quash in effect sustained the one-year bar of limitation, and directly involved a construction of the statute upon which the indictment was founded.....	16-18
CONCLUSION	18

CASES CITED.

	Page.
<i>Commonwealth v. Gould</i> , 12 Gray (Mass.) 171	8
<i>Duffy v. Britton</i> , 48 N. J. L. 371	9
<i>Ex parte Lange</i> , 18 Wall. 163	9, 10
<i>Joy v. State</i> , 14 Ind. 139	9
<i>Kepner v. United States</i> , 195 U. S. 100	7
<i>Marshall v. Commonwealth</i> , 20 Gratt. (Va.) 845	9
<i>Pritchett v. State</i> , 2 Sneed (Tenn.) 285	9
<i>Shoener v. Pennsylvania</i> , 207 U. S. 188	9
<i>State v. Fley</i> (S. C.), 4 Am. Dec. 583	9
<i>United States v. Adams Express Co.</i> , 229 U. S. 381	10
<i>United States v. Barber</i> , 219 U. S. 72	5, 11
<i>United States v. Keitel</i> , 211 U. S. 370	16
<i>United States v. Kissel</i> , 218 U. S. 601	14
<i>United States v. Nixon</i> , 235 U. S. 231	17
<i>United States v. Rabinowich</i> , 238 U. S. 78	17
<i>United States v. Rogoff</i> , 163 Fed. 311	9
<i>United States v. Van Vliet</i> , 23 Fed. 35	9
Am. & Eng. Ency. Law (2d ed.), vol. 24, p. 830	9
Bishop's New Crim. Proc., 1913, vol. 2, p. 623	5
Bishop's New Crim. Law (8th ed.), vol. 1, sec. 1027, par. 4	7
12 Cyc. 265	7

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 899.
v.	
HERMAN OPPENHEIMER ET AL.	

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.*

**BRIEF FOR THE UNITED STATES IN OPPOSITION TO
MOTION TO DISMISS.**

THE FACTS.

February 24, 1914, Herman H. Oppenheimer, defendant in error here, and nine others were jointly indicted in the District Court for the Southern District of New York under section 37 of the Criminal Code for conspiracy to conceal assets from a trustee in bankruptcy in violation of section 29b of the Bankruptcy Act of July 1, 1898, 30 Stat., 544, 554, c. 541. (R. 3-8.)¹ To this indictment the defendant, Oppenheimer, filed a demurrer, pleas in bar and

¹ Wherever the record is referred to, the "Extracts from Transcript of Record," printed by defendant in error, is meant.

abatement, and motion to quash, setting out, among other matters of defense, the one-year bar of limitation to the prosecution of offenses under the Bankruptcy Act prescribed in section 29d thereof. The trial court sustained the plea of limitation, saying (R. 25):

I therefore find that no lawful indictments were found against Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, or either of them within one year after the offenses alleged in the indictments, and that their prosecution is barred by section 29b (d) of the Bankruptcy Act. These indictments are therefore dismissed as to each and all of them.

December 21, 1914, a new indictment was returned in the same court against Oppenheimer and one of his associates for the same offense. (R. 9-14.) January 4, 1915, the defendant Oppenheimer filed four documents which he designated "Motion to Quash," "Plea in Abatement," "Plea in Bar," and "Demurrer." The first ground of defense advanced in *each of these variously termed pleadings* was prior adjudication under the indictments of February 24, 1914, substantially the same words being employed in them all to set out the plea. January 30, 1915, the so-called pleas in bar and abatement were withdrawn, joinder in demurrer filed by the Government, and the demurrer and the so-called motion to quash were argued. (R. 22, 23.) February 2 and 14, 1916, the trial court filed opinions (which are

consolidated in the record) overruling the demurrer; sustaining the motion to quash upon the first ground set up in its support, *i. e.*, prior adjudication; and directing the entry of an order quashing the indictment and discharging the defendant. (R. 23.)

The plaintiff in error seasonably filed assignment of errors, and perfected its writ of error under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246.

Defendant in error has filed motion to dismiss the writ of error, alleging lack of jurisdiction in this court to review the judgment. The only assignments necessary to be considered in connection with this motion are the first and the seventh:

I. The Court erred in holding that the action of the Court in quashing the former indictments Nos. 2461 and 2462 were [sic] a bar to a reindictment and prosecution upon a similar charge although the defendant had not been put in jeopardy under said former indictments.

VII. The Court erred in sustaining the motion to quash the indictment.

ARGUMENT.

I.

The so-called motion to quash filed by the defendant is in fact and in law a special plea in bar. The designation given to his pleading by a defendant can not change its essential nature. This court will disregard the misnomer and act upon the fact.

Under the Federal system of criminal procedure the matters alleged in the so-called motion to quash constituted a special plea in bar, and the grounds on which the district court sustained the motion could only have been appropriate to a ruling upon a special plea in bar—viz., that the indictment was barred by former jeopardy or by limitation. This court has jurisdiction under the Criminal Appeals Act to review the decision and determine whether the bar of jeopardy had attached or the bar of limitation had accrued.

The first ground set up by defendant in error in support of what he styled his "motion to quash," and upon which the court below based its decision, was (R. 15):

It appears from the records of this Court that the indictment herein is barred by reason of the adjudication *in re* United States against the same parties who are defendants in this indictment, numbers 2461 and 2462.

This constituted a special plea in bar, whether it was intended to present the defense of former acquittal, or did, in effect, renew the prior plea of limitation set up in bar of the first indictment. The bar of former jeopardy *must* be pleaded specially and that of limitation *may* be.

Bishop's New Crim. Proc., 1913, vol. 2, p. 623:

Matter in bar,—occurring after the offense was committed,—as, a conviction or acquittal or another indictment, or a pardon,—must be pleaded specially.

Ib., vol. 2, p. 623:

The statute of limitations may be pleaded specially, and sometimes it is. Yet this defence is permissible under the general issue.

The plea of not guilty was withdrawn and the general issue never joined. Limitation, if pleaded at all, was pleaded specially in this case.

See also *United States v. Barber* (1910), 219 U. S. 72, 77.

Numerous other pleas were embodied in the same "motion to quash," which is a hodge podge of special pleas in bar, plea in abatement, demurrer, and motion to quash; but all these were overruled by the trial court, and its ruling based solely upon the first special plea in bar quoted. *Supra*. After overruling the other pleas and stating that the indictment formerly found and dismissed was legally identical with the one here involved, the trial judge said:

With this as a premise, the disposition made of the first indictment is material. The sufficiency of that was before Judge Thomas upon a motion to quash, and was decided by him on October 1, 1914. His decision, which, of course, was in advance of any submission to or swearing of a jury, quashed the indictment and discharged the defendants thereunder. This decision proceeded upon the ground that the

prosecution was barred by the Statute of Limitations. No appeal was taken by the Government from this decision, and thus from October 1, 1914, when the decision was rendered, until December 21, 1914, when this indictment was found, there was nothing pending against these defendants. Should the prosecution under this last indictment be allowed to proceed when there is outstanding a judgment in favor of the defendants to the effect that the Statute of Limitations has run against their alleged offense? The Government urges that this may be done, and further sets forth to the court the fact that since the decision of Judge Thomas a decision of the Circuit Court of Appeals for this Circuit, *as well as a decision by the Supreme Court of the United States*, has shown that the Statute of Limitations did not run until three years after the offense instead of one year as held by him, and that his decision was thus erroneous. This latter, however, does not impress me as being of relevance provided the defendants have heretofore been heard upon this issue, have been discharged thereunder, and that judgment being unappealed from remains in force and effect. The decision of Judge Thomas in my judgment became the law of the case, and until reversed, protected the defendants from further prosecution arising upon the same state of facts. While, of course, were the case open to decision upon the question of limitation, the decision of the appellate courts would control, yet the law of the case having been settled previous to these decisions, the defendants should not be subjected to another prosecution while the judgment quash-

ing the indictment and discharging them still remains in force and effect. To hold otherwise is to subject the citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he should, until such decision is reversed, be allowed to go unmolested by another proceeding on the same charge. [*Italics ours.*]

It is well settled in the criminal jurisprudence of this country that a defendant is not placed in jeopardy by any ruling or judgment obtained upon his motion or plea prior to the impaneling of a jury, and that no such ruling or judgment will preclude the bringing of a new indictment for the same offense and a trial thereunder. No jury was ever impaneled in this case.

Kepner v. United States (1903), 195 U. S. 100, 128:

Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused.

Bishop's New Criminal Law, 8th ed., vol. 1, sec. 1027, par. 4:

Where, at any stage of the proceedings, the defendant procures the indictment to be quashed, he cannot in bar to a new one assert that the first is good, and he was in jeopardy under it.

12 Cyc. 265:

As a general rule, where an indictment is quashed on motion as insufficient, or a demurrer

thereto is sustained, and the accused is thereupon discharged, there is no such jeopardy as will bar prosecution on another indictment for the same offense (citing authorities from the appellate courts of Alabama, Arkansas, California, Indiana, Massachusetts, Michigan, Missouri, New York, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin).

Commonwealth v. Gould (1858), 12 Gray (Mass.), 171, 173:

But the effect of *quashing* an indictment is like that of a *nol. pros.* of it, or of its being adjudged bad on demurrer, or of an arrest of judgment for a defect therein, after a verdict of guilty has been returned; by neither of which is a defendant acquitted of the offense with which the indictment charged him, but is exempted only from liability on *that indictment*.

The plea of former acquittal is allowed and sustained on a maxim of the common law, that no one shall be brought into jeopardy more than once for the same offence. But when an original indictment is *quashed*, adjudged bad on demurrer, or when judgment thereon is arrested for a defect therein, it is held that the accused has not thereby been in jeopardy, within the meaning of that maxim. *Commonwealth v. Wheeler*, 2 Mass. 172. *Commonwealth v. Roby*, 12 Pick. 502. *Rez v. Burridge*, 3 P. W. 500, by Lord Hardwicke. 2 Hawk. c. 35. 2 Gabbett Crim. Law, 332. Archb. Crim. Pl. (13th ed.) 118 & *seq.*

See also:

United States v. Rogoff (1908), 163 Fed. 311, 312;

United States v. Van Vliet (1885), 23 Fed. 35;

Ex Parte Lange (1873), 18 Wall. 163, 173, 174;

Shoener v. Pennsylvania (1907), 207 U. S. 188, 195, 196;

Joy v. State (1860), 14 Ind. 139, 148;

Pritchett v. State (1854), 2 Sneed (Tenn.) 285;

State v. Fley (1809) (S. C.), 4 Am. Dec. 583, 587;

Duffy v. Britton (1886), 48 N. J. L. 371, affirming decision reported in 18 Vroom, 251, 253;

Marshall v. Commonwealth (1871), 20 Gratt. (Va.), 845, 846.

The court below evidently confused the doctrine of *res judicata* in civil cases with the somewhat similar doctrine of former jeopardy in criminal cases. The defendant in error falls into like confusion when he says (brief, 12-13):

But the *form* of pleading *res adjudicata* is immaterial so long as the necessary facts appear in the plea.

The plea of *res adjudicata* is unknown to the criminal law. The attempt to interpose it here is novel, but not allowable.

Am. & Eng. Ency. of Law (2d ed.), v. 24, p. 830:

The rule that a former adjudication is a bar to another action for the same claim or demand has its counterpart in criminal law in the doctrine of former jeopardy. But the two

rules, while similar in purpose and effect, are otherwise separate and distinct subjects.

Ex Parte Lange (1873), 18 Wall. 163, 168:

The principle finds expression in more than one form in the maxims of the common law. *In civil cases* the doctrine is expressed by the maxim that no man shall be twice *vexed* for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.

In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin, "*Nemo bis punitur pro eodem delicto,*" or, as Coke has it, "*Nemo debet bis puniri pro uno delicto.*" No one can be twice *punished* for the same crime or misdemeanor, is the translation of the maxim by Sergeant Hawkins.

The designation of the plea upon which the judgment here was had is immaterial in arriving at its true character. The defendant termed it a motion to quash; but the court below, while so designating it, really treated it as a special plea in bar—as it should have been treated—and gave judgment upon it as such. Under the established rules of criminal procedure it was impossible to treat it otherwise, and this court will so consider it.

In *United States v. Adams Express Company* (1912), 229 U. S. 381, objection was made to the jurisdiction of this court to review a judgment

sustaining a motion to quash service, which it was contended did not fall within the language of the Criminal Appeals Act. Apparently, a judgment of that character did not fall within the specific terms of that act, but this court said (p. 388):

It is objected that this court has no jurisdiction of the present writ of error under the act of March 2, 1907, c. 2564, 34 Stat. 1246, and that the court below had no authority to treat the motion of Barrett as equivalent to a demurrer. Without following the defendant into the niceties by which it seeks to escape the jurisdiction of this court after having eluded that of the court below, it is enough to say that in our opinion, *if we are to go behind the entry, the decision entered was one setting aside the indictment and was based upon the construction of the statute upon which the indictment is founded, within the meaning of the act of March 2, 1907.* [Italics ours.]

In *United States v. Barber* (1910), 219 U. S. 72, the defendant pleaded the bar of limitations as a plea in abatement, and counsel and the court below so termed it. On writ of error, the jurisdiction of this court to review a judgment upon what was denominated a plea in abatement, but constituted a plea in bar, was questioned. Mr. Chief Justice White conclusively settled the point, saying (p. 77, 78):

So far as the claim based upon the stipulation is concerned, it is plainly without merit, since we can only look to the judgment which was actually entered to determine what was decided with respect to the fourth count, and

the court in that judgment expressly placed its decision that the United States could not prosecute the defendants upon the plea of the bar of limitations. The claim that the pleas were not in bar but merely an abatement is we think equally untenable. *The designation of the respective pleas, as a plea in abatement, did not change their essential nature.* [Italics ours.]

Defendent in error contends that since he withdrew pleading which he actually termed his "plea in bar" it cannot now be held that the ground upon which the motion to quash was sustained constituted a "special plea in bar." The first ground of the actual plea in bar which was withdrawn was:¹

1. It appears from the records of this Court that the indictment herein is barred by reason of the adjudication by this Court on the indictments in this Court, in re United States against the same parties who are defendants in this indictment, which indictments were numbered 2461 and 2462.

It may be noted that almost the same words were used in the first ground set up in the plea in abatement, also withdrawn.

The first ground of the so-called motion to quash, as well as the first ground of what was termed a demurrer, reads:

1. It appears from the records of this court that the indictment herein is barred by reason

¹ This does not appear in the printed "Extracts from Transcript of Record," but appears in the full record of the case, and is here quoted by stipulation with the defendant.

of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462. (R. 15.)

Comparison of the pleas withdrawn, and those left in the record and argued, upon which the case was decided, discloses their substantial identity.

Defendant withdrew his plea, which was properly styled a plea in bar, but secured a consideration of and judgment upon identically the same plea under the misnomer of "motion to quash." He now seriously advances the contention that his erroneous designation of his own pleading may be used to defeat plaintiff in error's contention. Comment is unnecessary.

The point is also raised that where a defendant files a plea in bar the United States must either demur to it or answer, and that neither was done in this case. As heretofore pointed out, defendant in error set out former adjudication as the first ground of what he called a demurrer and the first point in his alleged motion to quash, and the lower court rendered its decision solely upon that plea. The Government filed a joinder in demurrer, which was the proper method to join issue upon the pleas filed by defendant under the designations which he had given them. It would be rather paradoxical and wholly unsound to permit a party to set up the same plea in two, three, four, or any number of instruments—all identical in words, or substantially so, and exactly identical in import—designate each instrument by such name as pleased his fancy; withdraw

all save one, which he incorrectly entitled a motion to quash, or a demurrer, when it was really a special plea in bar; and then attempt to hold his antagonist to a strict compliance with what he apparently believes to be the rule of pleading with regard to answering or traversing a special plea. The joinder in demurrer filed by plaintiff in error in response to defendant in error's demurrer to the indictment and motion to quash, was sufficient to join the issue, if, indeed, any character of pleading was necessary to be filed. Certainly defendant in error can not by affixing a misnomer to one of his pleas attempt now to hold the Government to rules of strict pleading, and contend that it should have answered his plea in its true character when he himself had otherwise entitled it.

II.

A decision upon a special plea in bar when the defendant has not been put in jeopardy is subject to review here whether or not it involves the construction of the statute upon which the indictment is based.

Defendant in error contends that under the Criminal Appeals Act a writ of error can be had on a decision sustaining a special plea in bar only when the validity or construction of the statute upon which the indictment is based is involved, quoting an excerpt from the opinion of this court in *United States v. Kissel* (1910), 218 U. S. 601, 606, in support. The contention is without merit, and the expression quoted is wholly misconstrued. The language employed in

the third clause of the act is plain and unambiguous, and gives the Government the right to a review by this court of any decision "sustaining a special plea in bar when the defendant has not been put in jeopardy." In the *Kissel* case, as well as the *Keitel* case cited therein, many points were advanced by the Government upon which a review was sought, and lengthy and elaborate briefs were filed covering matters of which no review was authorized by the Criminal Appeals Act. Discussing these, this court in effect stated that it would consider only the particular character of decisions designated by that statute, saying (pp. 606-607):

We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, c. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States v. Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged.

While this language is clear, the sense in which it was employed is even more distinctly emphasized in the *Keitel* case (1908), 211 U. S. 370, 398-399:

In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same.

III.

The order of the court entered upon the motion to quash in effect sustained the one-year bar of limitation, and directly involved a construction of the statute upon which the indictment was founded.

The court based its order sustaining the plea of former adjudication upon the decision of Judge Thomas on the demurrer and motion to quash filed by the defendants under the first indictments found. That decision was to the effect that the one year bar of limitation prescribed by the Bankruptcy Act applied; and was based upon a clear misconstruction of the statutes involved. The opinion rendered

and order entered in this case will perpetuate that error unless relief can be had in this court.

In *United States v. Rabinowich* (1915), 238 U. S. 78, involving a precisely similar indictment, this court held that the one year statute of limitation did not apply; that as the offense charged was conspiracy and not a violation of the bankruptcy law, the three year statute of limitation governed, and the indictment was not barred. That decision was conclusive of the law in the instant case, and the court below cannot, by merely referring to and adopting the erroneous decision of Judge Thomas under the former indictments, thus indirectly defeat the plain right of plaintiff in error to have the substantial effect of the ruling now complained of reviewed under the Criminal Appeals Act. The identical question of law, arising in exactly the same manner, is involved here as was presented in the *Rabinowich* case, *supra*, and the jurisdiction of this court to review the question was there definitely and conclusively fixed.

United States v. Nixon (1914), 235 U. S. 231, 236:

In rendering that decision he made a ruling of the very kind which the United States was entitled to have reviewed under the provisions of the Criminal Appeals Act (34 Stat. 1246). If that were not so the right of the Government could in any case be defeated by entering a general order of dismissal, without referring to the statute which was involved or without giving the reasons on which the decision was based.

The effect of the decision in the case at bar was to sustain a motion to quash the indictment upon the construction of a statute upon which it was founded; and the right to a review is given in the first clause of the Criminal Appeals Act.

CONCLUSION.

It is respectfully submitted that the motion to dismiss should be denied.

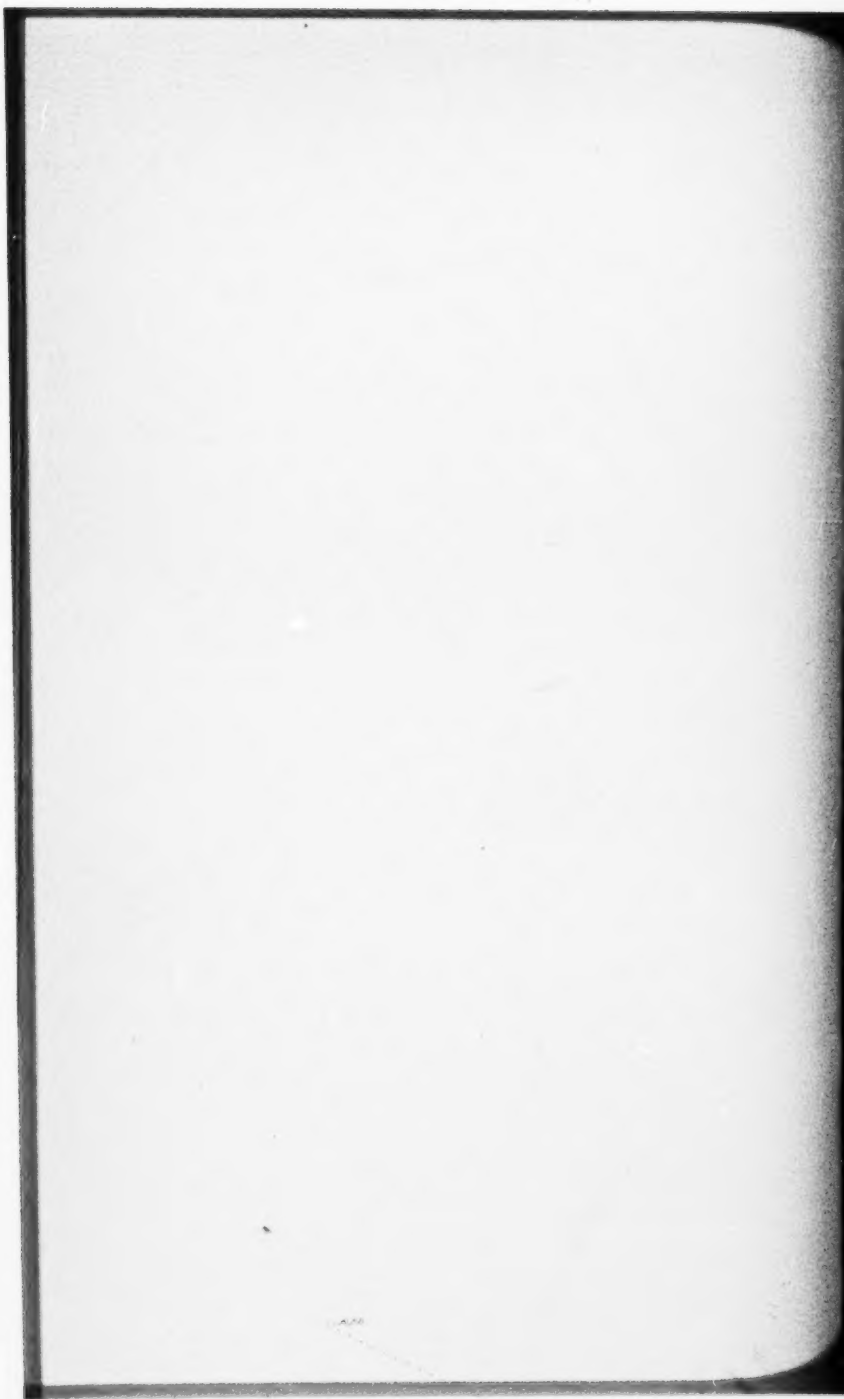
JOHN W. DAVIS,
Solicitor General.

CHARLES WARREN,
Assistant Attorney General.

APRIL, 1916.

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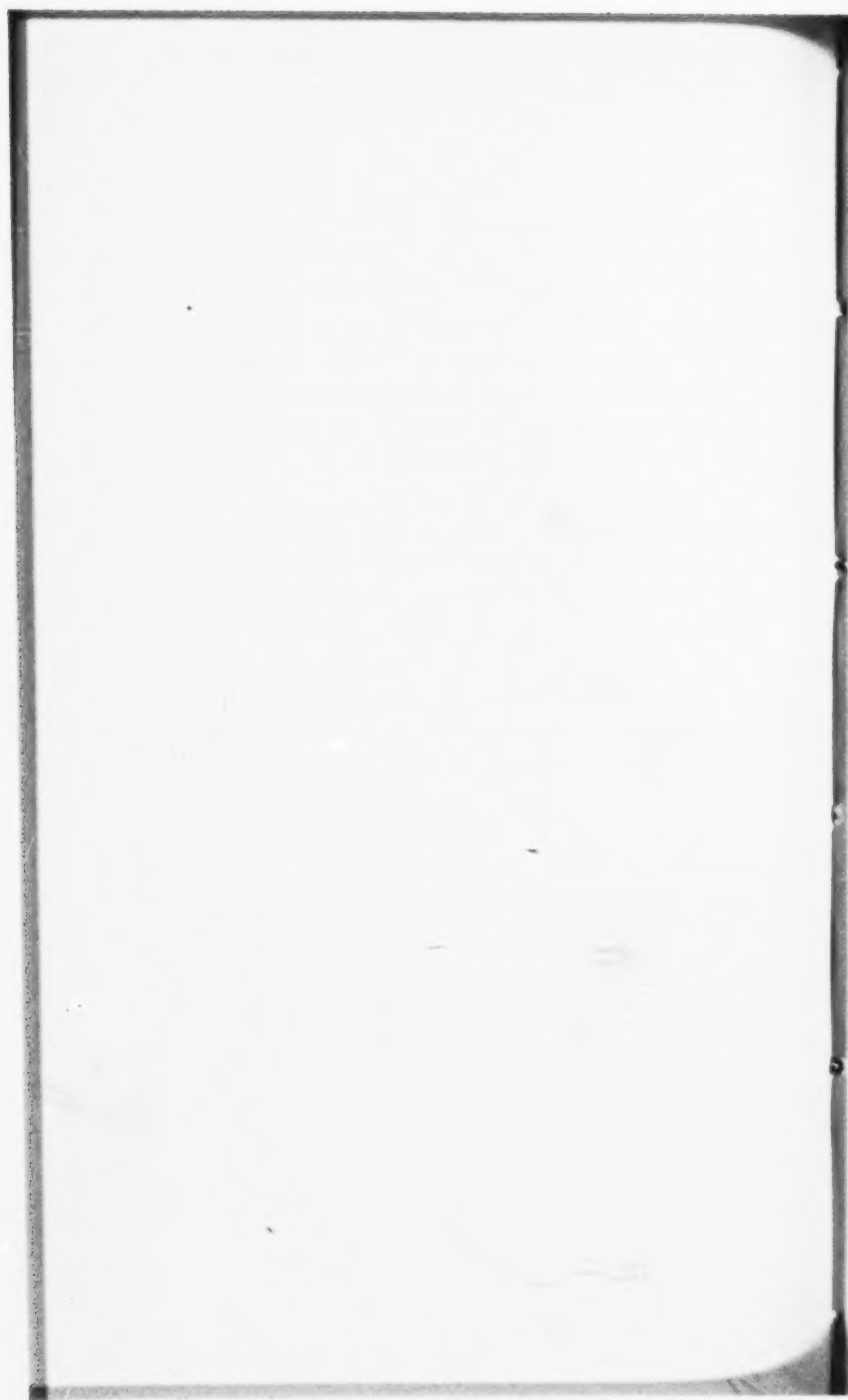
INDEX.

	Page.
THE FACTS	1-11
ARGUMENT:	
I. The so-called "motion to quash" filed by the defendant was in fact and in law a special plea in bar. The designation given to his pleading by defendant or by the court below can not change its essential nature. This Court will disregard the misnomer and act upon the fact. It has jurisdiction under the Criminal Appeals Act to review the decision in this case and determine whether the bar of jeopardy had attached....	12-18
II. The defendant was not placed in jeopardy under the former indictments nor did the decision of Judge Thomas, on the pleas to those indictments, become res adjudicata. The erroneous decision that the indictments were barred by the one-year statute of limitations was rendered upon preliminary pleas which were interposed before any submission to or the swearing of a jury, and under such condition jeopardy could not attach or the case be finally determined on its merits.....	18-22
III. The first ground of the pleading, termed "Motion to quash," really renewed the defense of the one-year bar of limitation embodied in sections 29d of the Bankruptcy Act which had been sustained to the former indictments, and necessarily involved a construction of the conspiracy statute (Criminal Code, section 37) under which the indictment here involved was brought.....	23-24
IV. A decision upon a special plea in bar when the defendant has not been put in jeopardy is subject to review here, whether or not it involves the construction of the statute upon which the indictment is based.....	24-26

V. The indictment in this case alleges that an additional overt act was committed by the defendant in error less than one year before it was brought, and as limitation begins to run from the commission of the last overt act and not from the date of the formation of the conspiracy, the decision of Judge Thomas discharging the defendants under the former indictments on the plea of the one-year bar can have no application in this case and necessarily can not become the law of the case or constitute res adjudicata	26-31
VI. (This point is suggested by the brief of the defendant in error on his motion to dismiss.) The contentions of the defendant in error that (1) the errors assigned are insufficient, and (2) that the writ of error and citation are defective, because the names of all parties indicted are not specifically mentioned therein, are not sustained by the authorities cited	31-34
CONCLUSION	34

CASES CITED.

	Page.
<i>Brown v. Elliott</i> (1911), 225 U. S. 392	29
<i>Commonwealth v. Gould</i> , 12 Gray (Mass.) 171	20
<i>Duffy v. Britton</i> , 48 N. J. L. 371	20
<i>Durland v. United States</i> (1895), 161 U. S. 305	13
<i>Ex Parte Lange</i> , 18 Wall. 163	20, 22
<i>Joy v. State</i> , 14 Ind. 139	20
<i>Kepner v. United States</i> , 195 U. S. 100	18
<i>Marshall v. Commonwealth</i> , 20 Gratt. (Va.) 845	20
<i>Pritchett v. State</i> , 2 Sneed (Tenn.) 285	20
<i>Shoener v. Pennsylvania</i> , 207 U. S. 188	20
<i>State v. Fley</i> (S. C.), 4 Am. Dec. 583	20
<i>United States v. Adams Express Co.</i> , 229 U. S. 381	15
<i>United States v. Barber</i> , 219 U. S. 72	15
<i>United States v. Keitel</i> , 211 U. S. 370	25
<i>United States v. Kissel</i> , 218 U. S. 601	13, 25, 29
<i>United States v. Pond</i> (1855), 2 Curt. 265	14
<i>United States v. Rabinowich</i> , 238 U. S. 78	23
<i>United States v. Rogoff</i> , 163 Fed. 311	20
<i>United States v. Van Vliet</i> , 23 Fed. 35	20
Am. & Eng. Ency. Law (2d ed.), vol. 24, p. 830	22
Archb. Criminal Practice and Pleading (Pomeroy's notes, 8th ed.) 318	14
Bishop's New Crim. Proc., 1913, vol. 2, p. 623	13
Bishop's New Crim. Law (8th ed.), vol. 1, sec. 1027, par. 4	19
12 Cyc. 265	19
Encyclopedia, Pleading and Practice, p. 569	13



In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR, v. HERMAN H. OPPENHEIMER ET AL.	}	No. 899.
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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

February 24, 1914, two indictments, numbered, respectively, 2461 (R. 3-8) and 2462 (R. 8-13), were returned in the District Court for the Southern District of New York against Herman H. Oppenheimer, the defendant in error here, and a number of others, under section 37 of the Criminal Code, for conspiracy to conceal assets from a trustee in bankruptcy, in violation of section 29b of the bankruptcy act of July 1, 1898 (30 Stat. 544, 554). To these indictments, the defendant Oppenheimer filed a demurrer and what he designated "Motion to quash plea in bar

and abatement" (R. 14, 15), setting out in each of these pleadings the one-year bar of limitation to the prosecution of offenses under the bankruptcy act prescribed in section 29d thereof. Judge Thomas, the trial judge, considered these pleadings of Oppenheimer and of three of the co-defendants charged in the respective indictments, saying (R. 45, 46):

Four of the defendants, Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, are represented by counsel, and pleadings bearing various titles have been filed in their behalf. Each of these four last-mentioned defendants in his pleadings asks that the indictment, so far as it relates to him, be quashed for the reason that the acts alleged in the indictment are barred by the statute of limitations contained in section 29d of the Bankruptcy Act. Said section reads as follows:

"A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense."

In my opinion the above-quoted section is determinative of the issues presented by the indictment against the aforementioned defendants who have, in their pleadings attacking the indictment, invoked the provision of said section, hence there is no occasion to determine other questions raised by pleadings, some of which are of vital importance and decisive.

And discharged the defendants October 1, 1914, saying (R. 47):

I therefore find that no lawful indictments were found against Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, or either of them, within one year after the offenses alleged in the indictments, and that their prosecution is barred by section 29d of the bankruptcy act. These indictments are therefore dismissed as to each and all of them.

December 21, 1914 (in the same year) (R. 16-21), a new indictment, numbered 2882, was returned in the *same* District Court against Oppenheimer and some of the *same* parties included in the previous indictments of February 24, 1914, charging the *same* offense—i. e., conspiracy to conceal assets from a trustee in bankruptcy; this new indictment alleging a later and additional overt act in furtherance and continuance of the result of the conspiracy—viz, that Oppenheimer had falsely testified in a hearing before a referee in bankruptcy, January 19, 1914, that he had received no money or property in the bankruptcy cases upon which this indictment was based. The later indictment unquestionably charged a continuing conspiracy. December 22, 1914, Oppenheimer filed a plea of not guilty, which was withdrawn January 21, 1915. (R. 44, 45.) January 4, 1915, Oppenheimer filed four pleadings which he respectively designated "Demurrer" (R. 22, 23), "Motion to quash" (R. 24, 25), "Plea in abatement" (R. 53, 55), and "Plea in bar" (R. 55-57). The first ground of defense advanced in

each of these variously termed pleadings was prior adjudication under the indictments of February 24, 1914, the defendant using the following language in the respective pleadings to set out this defense:

DEMURRER.

1. It appears from the records of this court that the *indictment herein is barred* by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462. (R. 22.)

MOTION TO QUASH.

1. It appears from the records of this court that the *indictment herein is barred* by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462. (R. 24.)

PLEA IN ABATEMENT.

1. It appears from the records of this court that the *indictment herein is barred* by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462. This indictment sets forth and is based on the same conspiracy as the last indictment, which last indictment is hereby made a part of this plea together with the opinion and order thereon now on file in this court. (R. 53.)

PLEA IN BAR.

1. It appears from the records of this court that the *indictment herein is barred* by reason of the adjudication by this court on the in-

dictments in this court, in re United States against the same parties who are defendants in this indictment, which indictments were numbered 2461 and 2462. (R. 56.)

January 30, 1915, the so-called plea in bar and plea in abatement were withdrawn; *joinder in demurrer was filed by the Government*, and the demurrer and the so-called motion to quash were argued before Judge Pope, of the District of New Mexico, then sitting in the Southern District of New York (R. 45). February 14, 1916, Judge Pope filed an opinion and decision, overruling the demurrer *in toto*, although, singularly enough, it embodied the identical defense, *res adjudicata*, upon which he based his decision, and was no more erroneously included in the one pleading than the other. Portions of his opinion pertinent to this case are as follows (R. 47-49):

OPINION.

The demurrer and the *motion to quash* filed by the several defendants proceed upon a number of grounds. All of these have been carefully examined.

* * * * *

The only ground which impresses the court as serious as against the validity of the present indictment arises out of the following state of facts:

An indictment was found against these same defendants on February 24, 1914, which, in legal effect, is identical with the indictment here under consideration. This latter statement is made advisedly, notwithstanding the

fact that the present indictment, found December 21, 1914, contains an alleged overt act in addition to those set forth in the indictment of February 24. In other respects the indictments are practically identical. An examination of the additional overt act alleged in the last indictment leads to the view that, notwithstanding certain conclusions of law therein set forth, the matters therein stated cannot, from their nature, constitute an overt act under the conspiracy alleged in each of the indictments. It follows, therefore, as stated above, that the two indictments are legally identical.

With this as a premise, the disposition made of the first indictment is material. The sufficiency of that was before Judge Thomas upon a motion to quash, and was decided by him on October 1, 1914. His decision (which of course was in advance of any submission to or swearing of a jury) quashed the indictment and discharged the defendants thereunder. This decision proceeded upon the ground that the prosecution was barred by the statute of limitations. No appeal was taken by the Government from this decision, and thus from October 1, 1914, when the decision was rendered, until December 21, 1914, when this indictment was found, there was nothing pending against these defendants. Should the prosecution under this last indictment be allowed to proceed when there is outstanding a judgment in favor of the defendants to the effect that the statute of limitations has run against their alleged offense? The Govern-

ment urges that this may be done, and further sets forth to the court the fact that since the decision of Judge Thomas a decision of the Circuit Court of Appeals for this Circuit, as well as a decision by the Supreme Court of the United States (*United States v. Rabinowich*, 1915, 238 U. S. 78) [inserted by us], has shown that the statute of limitations did not run until three years after the offense instead of one year as held by him, and that his decision was thus erroneous. This latter, however, does not impress me as being of relevancy, provided the defendants have heretofore been heard upon this issue, have been discharged thereunder, and that judgment being unappealed from remains in force and effect. The decision of Judge Thomas in my judgment became the law of the case, and, until reversed, protected the defendants from further prosecution *arising upon the same state of facts*. (Italics ours.) While, of course, were the case open to decision upon the question of limitation, the decision of the appellate courts would control, yet the law of the case having been settled previous to these decisions, the defendants should not be subjected to another prosecution while the judgment quashing the indictment and discharging them still remains in force and effect. To hold otherwise is to subject the citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he should, until such decision is reversed, be allowed to go unmolested by another proceeding on the same charge.

An order will accordingly be entered quashing the indictment of December 21, 1914, and allowing the defendants to go without day thereunder.

This January 29, 1916.

In conformity with this opinion and decision, Judge Hand, of the United States District Court for the Southern District of New York, entered an order, February 26, 1916, which recites (R. 49):

A motion to quash the indictment herein having been filed by the defendant, Herman H. Oppenheimer, and having duly come on to be heard before the Honorable William H. Pope, district judge, on the 29th day of January, 1915;

Now, after reading the decision and opinion of Honorable William H. Pope, United States district judge, dated January 29, 1916, and filed in the office of the clerk of the District Court of the United States for the Southern District of New York on February 2, 1916, and the amended opinion of said judge, it is

Ordered and adjudged, that the motion to quash made by the defendant, Herman H. Oppenheimer, be granted, and the indictment is hereby quashed and the defendants allowed to go without day thereunder.

The United States seasonably filed assignment of errors (R. 50) and perfected its writ of error under the Criminal Appeals Act of March 2, 1907, 34 Stat., 1246. (R. 50, 51, 1, 2.)

At the last term of this Court, plaintiff in error filed a motion to advance, which was granted, and

defendant in error filed a motion to dismiss the writ of error, alleging lack of jurisdiction in this Court to review the judgment. This motion was passed to be considered in connection with the whole case at this term.

Statute Involved.

The Criminal Appeals Act of March 2, 1907, 34 Stat., 1246, provides:

That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

Specifications of Error.

I. The court erred in designating the plea upon which its decision was based a "Motion to quash" instead of a "Special plea in bar," which it really was.

II. The court erred in holding that the prosecution was barred by the decision quashing the former indictments against the defendant in error.

III. The court erred in holding that the last overt act—i. e., the one alleged to have been committed January 19, 1914—set out in the indictment herein did not constitute an overt act under the conspiracy alleged in the indictment, and that the former indictments and this indictment are legally identical.

The Questions Involved.

Besides the questions raised on the assignment of errors, defendant in error, in his brief on his motion to dismiss, suggests other questions which will be briefly noted herein.

I.

Can the jurisdiction of this Court be divested by an erroneous designation of a plea by the defendant filing it or by the trial court passing upon it, either or both?

II.

Was not the plea upon which the trial court based its decision in this case, in law and in fact, a special plea in bar and not a motion to quash, and has not this Court jurisdiction under the Criminal Appeals Act to review a decision or judgment sustaining such a plea, *however pleaded*, when the defendant has not been put in jeopardy?

III.

Is not the construction of a statute—section 37 of the Criminal Code—involved in the decision of the court quashing the indictment?

IV.

Was the defendant in error placed in jeopardy by the decision of the trial court sustaining his plea of limitation to the first indictments?

V.

Did not the alleged false statement made by the defendant in error before the referee in bankruptcy on January 19, 1914, constitute an overt act in furtherance of the alleged conspiracy to conceal the assets of the bankrupt and the result thereof, and render the indictment herein different from those theretofore quashed; and bar the application of "the law of the case" upon which Judge Pope founded his decision?

VI.

Does the plea of *res adjudicata* have any application to a decision in a criminal case, based upon a preliminary plea in bar, filed and passed upon by the court, before a jury has been sworn?

VII.

Was the writ of error, assignment of errors, or citation, or either of them, defective; and if so, would such defects, or any of them, be sufficient to invalidate the writ?

ARGUMENT.

I.

The so-called "motion to quash" filed by the defendant was in fact and in law a special plea in bar. The designation given to his pleading by defendant or by the court below can not change its essential nature. This Court will disregard the misnomer and act upon the fact. It has jurisdiction under the Criminal Appeals Act to review the decision in this case and determine whether the bar of Jeopardy had attached.

Judge Pope based his decision upon the first ground set up by the defendant in error in his so-called "Motion to quash," viz (R. 24):

1. It appears from the records of this court *that the indictment herein is barred by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462.*

While it is quite clear that this plea constituted a special plea in bar, whatever it may have been designated, the language of the pleader "*that the indictment herein is barred*" plainly discloses that he so regarded it. Whether it was intended to advance the defense of former jeopardy or of *res adjudicata*, as the defendant in error termed it, or renew the defense of limitation, the first two defenses *must* be pleaded specially, and the last can be pleaded only under the general issue. Necessarily all constitute special pleas in bar, however pleaded.

Bishop's New Crim. Proc., 1913, vol. 2, p. 623:

Matter in bar—occurring after the offense was committed, as a conviction or acquittal or another indictment, or a pardon—must be pleaded specially.

In a case of this character, charging a continuing conspiracy, the plea of limitation could be pleaded only under the general issue. It was error to plead it specially, as was done in this case, and, under the Criminal Appeals Act, this Court has reversed a case of this character; i. e., of continuing conspiracy, where otherwise pleaded. (*United States v. Kissel* [1910], 218 U. S. 601, 610.)

It is wholly immaterial that the pleader styled his pleading "Motion to quash," since the judge in the court below could not have rendered the decision he did upon a motion to quash. This Court will treat the pleading in its true character.

A motion to quash is in the nature of a demurrer, and according to the great weight of authority may be employed only to raise questions as to defects which are apparent upon the fact of the indictment.

See *Encyclopedia, Pleading and Practice*, p. 569, and cases cited.

In *Durland v. United States* (1895), 161 U. S. 305, the Court said (314):

These objections were raised by the motion to quash the indictment, but such a motion is ordinarily addressed to the discretion of the court, and the refusal to quash is not, generally, assignable for error.

In *United States v. Pond* (1855), 2 Curt 265, the circuit court said:

A motion by the defendant to quash an indictment must be founded on defects which would make a judgment against him, on that indictment, erroneous.

It is evident that the excerpts quoted *supra* would not justify the inclusion of a special plea in bar in a motion to quash, since the matter of finally sustaining such a motion being within the discretion of the trial court, that court, regardless of the Criminal Appeals Act, could indirectly sustain a special plea in bar filed under the designation of a motion to quash and leave the Government absolutely remediless to come to this Court under that act. Neither is the particular ground embodied in the motion to quash in this case upon which the opinion to sustain was based addressed to any defect in the indictment, and Judge Pope in his opinion expressly stated (R. 47, 48) that there were no defects therein. It is quite clear, therefore, that the plea was erroneously designated under the rules governing criminal procedure in United States courts.

See also Archb. Criminal Practice and Pleading (Pomeroy's notes, 8th ed.), 318:

In all cases where an indictment is so defective that any judgment to be given upon it against the defendant would be erroneous, the court in its discretion may quash it.

Judge Pope stated, in effect, that a judgment upon the indictment here would not be erroneous. It was

to prevent a valid judgment being entered upon a good indictment that he sustained the special plea in bar erroneously plead in the motion to quash.

In *United States v. Adams Express Company* (1912), 229 U. S. 381, objection was made to the jurisdiction of this Court to review a judgment sustaining a motion to quash service, which it was contended did not fall within the language of the Criminal Appeals Act. Apparently, a decision of that character did not fall within the specific terms of the act, but this Court said (p. 388):

It is objected that this court has no jurisdiction of the present writ of error under the act of March 2, 1907, c. 2564, 34 Stat. 1246, and that the court below had no authority to treat the motion of Barrett as equivalent to a demurrer. Without following the defendant into the niceties by which it seeks to escape the jurisdiction of this court after having eluded that of the court below, it is enough to say that in our opinion, *if we are to go behind the entry, the decision entered was one setting aside the indictment and was based upon the construction of the statute upon which the indictment is founded, within the meaning of the act of March 2, 1907.* [Italics ours.]

In *United States v. Barber* (1910), 219 U. S. 72, the defendant set up the bar of limitations as a plea in abatement, and counsel and the court below so termed it. On writ of error, the jurisdiction of this Court to review a judgment upon what was denominated a plea in abatement, but constituted a plea in

bar, was questioned. Mr. Chief Justice White conclusively settled the point, saying (p. 77, 78):

So far as the claim based upon the stipulation is concerned, it is plainly without merit, since we can only look to the judgment which was actually entered to determine what was decided with respect to the fourth count, and the court in that judgment expressly placed its decision that the United States could not prosecute the defendants upon the plea of the bar of limitations. The claim that the the pleas were not in bar but merely in abatement is, we think, equally untenable. *The designation of the respective pleas, as a plea in abatement, did not change their essential nature.* [Italics ours.]

Defendant in error contends in his brief that since he withdrew a pleading which he actually termed his "plea in bar" it can not now be held that the ground upon which the motion to quash was sustained constituted a "special plea in bar."

The ground upon which Judge Pope's decision was based, whether considered as setting up former jeopardy, *res adjudicata*, or limitation, constituted a special plea in bar and could have constituted nothing else. This Court has jurisdiction to review such a decision provided only the defendant was not placed in jeopardy.

Defendant withdrew the plea which was properly styled a plea in bar, but secured a consideration of, and judgment upon identically the same plea under the misnomer of "motion to quash." He now seriously advances the contention that his erroneous

designation of his own pleading may be used to defeat plaintiff in error's contention. Comment is unnecessary.

The point is also raised that, where a defendant files a plea in bar, the United States must either demur to it or answer, and that neither was done in this case. As heretofore pointed out, defendant in error set out former adjudication as the first ground of what he called a demurrer and as the first point in his alleged motion to quash; and the lower court rendered its decision solely upon the latter plea. The Government filed a joinder in demurrer, which was the proper method to join issue upon the pleas filed by defendant under the designations which he had given them. It would be rather paradoxical and wholly unsound to permit a party to set up the same plea in two, three, four, or any number of instruments—all identical in words, or substantially so, and exactly identical in import—designate each instrument by such name as pleased his fancy; withdraw all save one, which he incorrectly entitled a motion to quash, or a demurrer, when it was really a special plea in bar; and then to attempt to hold his antagonist to a strict compliance with what he apparently believes to be the rule of pleading with regard to answering or traversing a special plea. The joinder in demurrer filed by plaintiff in error in response to defendant in error's demurrer to the indictment and motion to quash, was sufficient to join the issue, if, indeed, any character of pleading was necessary to be filed. Certainly defendant in error can not by affix-

ing a misnomer to one of his pleas attempt now to hold the Government to rules of strict pleading, and contend that it should have answered his plea in its true character when he himself had otherwise entitled it.

II.

The defendant was not placed in jeopardy under the former indictments nor did the decision of Judge Thomas, on the pleas to those indictments become *res adjudicata*. The erroneous decision that the indictments were barred by the one-year statute of limitations was rendered upon preliminary pleas which were interposed before any submission to or the swearing of a jury, and under such condition jeopardy could not attach or the case be finally determined on its merits.

In his opinion and decision in this case Judge Pope says, referring to the decision of Judge Thomas (R. 48): "*His decision (which of course was in advance of any submission to or swearing of a jury) quashed the indictment and discharged the defendants thereunder.*" (Italics ours.)

In any contested case, a person charged with crime can be *tried* in a court of the United States only before a jury, and judgment of conviction or acquittal can be entered only upon the jury's verdict. Unless he plead guilty, the guilt or innocence of a defendant must be determined by a jury, and, in its absence, it is impossible for jeopardy to attach or for the case to become *res adjudicata*.

Kepner v. United States (1903), 195 U. S. 100, 128, 129:

Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to

a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. * * *

The Constitution of the United States, in the Fifth Amendment, declares, "nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. *An acquittal before a court* having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Commonwealth v. Peters*, 12 Met., 387; 2 Hawk. P. C., c. 35, sec. 3; 1 Bishop's Crim. Law, sec. 1028.

Bishop's New Criminal Law, 8th ed., vol. 1, sec. 1027, par. 4:

Where, at any stage of the proceedings, the defendant procures the indictment to be quashed, he can not in bar to a new one assert that the first is good, and he was in jeopardy under it.

12 Cyc., 265:

As a general rule where an indictment is quashed on motion as insufficient or a demurrer thereto is sustained and the accused is thereupon discharged, there is no such jeopardy as will bar a prosecution on another indictment for the same offense (citing authorities from the appellate courts of Alabama,

Arkansas, California, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New York, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wisconsin).

Commonwealth v. Gould (1858), 12 Gray (Mass.) 171, 173:

But the effect of *quashing* an indictment is like that of a *nol. pros.* of it, or of its being adjudged bad on demurrer, or of an arrest of judgment for a defect therein, after a verdict of guilty has been returned; by neither of which is a defendant acquitted of the offense with which the indictment charged him, but is exempted only from liability on *that indictment*.

The plea of former acquittal is allowed and sustained on a maxim of the common law, that no one shall be brought into jeopardy more than once for the same offense. But when an original indictment is *quashed*, adjudged bad on demurrer, or when judgment thereon is arrested for a defect therein, it is held that the accused has not thereby been in jeopardy, within the meaning of that maxim. *Commonwealth v. Wheeler*, 2 Mass. 172. *Commonwealth v. Roby*, 12 Pick. 502. *Rex v. Burridge*, 3 P. W. 500, by Lord Hardwicke. 2 Hawk. c. 35. 2 Gabbett Crim. Law, 332. Archb. Crim. Pl. (13th ed.) 118 & *seq.*

See also, *United States v. Rogoff* (1908), 163 Fed. 311, 312; *United States v. Van Vliet* (1885), 23 Fed. 35; *Ex Parte Lange* (1873), 18 Wall. 163, 173, 174; *Shoener v. Pennsylvania* (1907), 207 U. S. 188, 195, 196; *Joy v. State* (1860), 14 Ind. 139, 148; *Pritchett v. State* (1854), 2 Sneed (Tenn.) 285; *State v. Fley* (1809) (S. C.), 4 Am. Dec. 583, 587; *Duffy v. Britton* (1886), 48 N. J. L. 371, affirming decision reported in 18 Vroom 251, 253; *Marshall v. Commonwealth* (1871), 20 Gratt. (Va.) 845, 846.

Both the court below and the defendant in error in his brief on his motion to dismiss appear to have considered the decision of Judge Thomas on the motion to quash the first indictment as constituting *res adjudicata* in this case, Judge Pope, in his opinion, saying (R. 48, 49):

The decision of Judge Thomas in my judgment became the law of the case, and, until reversed, protected the defendants from further prosecution arising upon the same state of facts.

The defendant in error says in his brief (brief of defendant in error on motion to dismiss, 12-13):

But the *form* of pleading *res adjudicata* is immaterial so long as the necessary facts appear in the plea.

And (ib. 15):

The decision was really "*res adjudicata*," a defense which can be set up at any time in any plea or in a special plea without other name. In fact it can be of the Court's own motion at any time, when the law may come to its attention.

What Judge Pope really decided was that the defendant had been placed in jeopardy under the former indictment, that the bar of limitation had attached, or that the principle of *res adjudicata* applied. Each of the conclusions is erroneous.

The plea of *res adjudicata* is apparently unknown to the criminal law. The attempt to interpose it here is novel, but not allowable.

Am. & Eng. Ency. of Law (2d ed.), v. 24, p. 830:

The rule that a former adjudication is a bar to another action for the same claim or demand has its counterpart in criminal law in the doctrine of former jeopardy. But the two rules, while similar in purpose and effect, are otherwise separate and distinct subjects.

Ex Parte Lange (1873), 18 Wall. 163, 168:

The principle finds expression in more than one form in the maxims of the common law. *In civil cases* the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.

In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin, "*Nemo bis punitur pro eodem delicto,*" or, as Coke has it, "*Nemo debet bis puniri pro uno delicto.*" No one can be twice punished for the same crime or misdemeanor, is the translation of the maxim by Sergeant Hawkins.

III.

The first ground of the pleading, termed "Motion to quash," really renewed the defense of the one-year bar of limitation embodied in section 29d of the Bankruptcy Act which had been sustained to the former indictments, and necessarily involved a construction of the conspiracy statute (Criminal Code, section 37) under which the indictment here involved was brought.

The motion to quash was sustained by Judge Pope upon the ground that the decision of Judge Thomas under the former indictments holding that the one-year bar of limitation prescribed in the Bankruptcy Act was applicable, instead of the three-year bar to the conspiracy statute, constituted the "law of the case" and that the prosecution was accordingly barred by the rule of *res adjudicata*. This Court, in *United States v. Rabinowich* (238 U. S. 78), which was based upon an indictment for conspiracy to conceal assets in violation of section 29b of the Bankruptcy Act, held that the three-year bar applied.* The decision in the *Rabinowich case* (1915) necessarily

The case of *United States v. Rabinowich* involved the same point as was raised in the first *Oppenheimer case*, and arose in the same district. After the decision by Judge Thomas, October 1, 1914, in the first *Oppenheimer case*, Judge Hough, following that decision, held in the *Rabinowich case*, November 25, 1914, that the one-year statute of limitations, and not the three-year statute, applied, and consequently overruled a demurrer filed by the United States to the defendant's special plea in bar setting up the one-year statute of limitations. The United States took an appeal to the Supreme Court under the Criminal Appeals Act and a writ of error was allowed December 8, 1914. On June 1, 1915, the Supreme Court overruled Judge Hough, sustained the Government demurrer, and held that the three-year statute of limitations applied. Meanwhile, during the period when the *Rabinowich case* appeal was pending in the Supreme Court, the second *Oppenheimer* indictments were found, December 21, 1914.

governs this case; and Judge Pope, in his opinion here, written in 1916, by merely referring to and adopting the erroneous decision of Judge Thomas on the former indictment can not defeat the right of plaintiff in error to have the construction of the conspiracy statute reviewed here.

IV.

A decision upon a special plea in bar when the defendant has not been put in jeopardy is subject to review here, whether or not it involves the construction of the statute upon which the indictment is based.

Defendant in error contends that under the Criminal Appeals Act a writ of error can be had on a decision sustaining a special plea in bar only when the validity or construction of the statute upon which the indictment is based is involved, quoting an excerpt from the opinion of this Court in *United States v. Kissel* (1910), 218 U. S. 601, 606, in support. The contention is without merit, and the expression quoted is wholly misconstrued. The language employed in the third clause of the act is plain and unambiguous, and gives the Government the right to a review by this Court of any decision "sustaining a special plea in bar when the defendant has not been put in jeopardy." In the *Kissel case*, as well as in the *Keitel case* cited therein, many points were advanced by the Government upon which a review was sought, and lengthy and elaborate briefs were filed covering matters of which no review was authorized by the

Criminal Appeals Act. Discussing these, this Court in effect stated that it would consider only the particular character of decisions designated by that statute, saying (pp. 606-607):

We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, c. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States v. Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged.

While this language is clear, the sense in which it was employed is even more distinctly emphasized in the *Keitel Case* (1908), 211 U. S. 370, 398-399:

In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the ex-

ceptional right to review in favor of the United States is limited by the very terms of the Statute to authority to reexamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same.

V.

The indictment in this case alleges that an additional overt act was committed by the defendant in error less than one year before it was brought, and as limitation begins to run from the commission of the last overt act and not from the date of the formation of the conspiracy, the decision of Judge Thomas discharging the defendants under the former indictments on the plea of the one year bar can have no application in this case and necessarily can not become the law of the case or constitute res adjudicata.

All the overt acts set out in the first indictments were alleged to have occurred in the year 1912 and the conspiracy was charged to have been effected in that year. The indictment in this case charges (R. 20, 21):

And further, in pursuance of and to effect the object of said conspiracy and in order to aid and assist the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Charles Hepner, Herman J. Dietz, and Herman H. Oppenheimer, in continuing the conceal-

ment from said trustee in bankruptcy of the money and property belonging to the said estates in bankruptcy of the said Joseph Samuels & Co., so concealed from said trustee in bankruptcy, the said Herman H. Oppenheimer, in a bankruptcy proceeding instituted and pending in the United States District Court for the Southern District of New York, to have the said Jacques Samuels and one Benjamin Lesser, individually and as copartners, doing business under the firm name of Abrahams & Lesser, adjudged bankrupts under the bankruptcy laws of the United States, and of which copartnership the said Jacques Samuels was a member and principal owner, was examined before the said Macgrane Coxe, Esquire, referee in bankruptcy, in support of an application made by the said Herman H. Oppenheimer for an allowance as the attorney for the said copartnership of Abrahams & Lesser and the said Jacques Samuels as a member of said copartnership; *and the said Herman H. Oppenheimer did, then and there, on the 19th day of January, 1914, willfully and falsely testify, in substance and effect, that he had, since the latter part of July, 1912, and up to the said 19th day of January, 1914, received no money or property in said bankruptcy action so pending against Joseph Samuels & Co., individually and as a copartnership as aforesaid, as compensation for legal services, except that he, the said Herman H. Oppenheimer, had received an agreement to be paid compensation in addition to whatever*

allowance might be made to him by the court for such services out of the estates in bankruptcy of said Joseph Samuels & Co., individually and as a copartnership, as aforesaid, whereas, in truth and in fact, the said Herman H. Oppenheimer did, on or about the 1st day of September, 1912, receive from the said Jacques Samuels a promissory note in and for the sum of \$897.36, with interest, made by the Universal Textile Company, a customer of said Joseph Samuels & Co., dated July 20, 1912, payable two months after date, to the order of Joseph Samuels & Co., and did thereafter, on September 11, 1912, receive payment therefor in the sum of \$897.36, which said promissory note and its proceeds was the property of the said copartnership of Joseph Samuels & Co. and would, in the due administration of the said estates in bankruptcy, have belonged to the said estates in bankruptcy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 37 U. S. C. C. and sec. 29b of the bankruptcy act.)

The alleged false statement of the defendant in error in the hearing before the referee in bankruptcy was made in continuance of the result of the conspiracy and with the intent to deprive the estate of the bankrupt of a portion of its assets. Had the defendant in error testified truly that he had received and collected the note for \$897.36, the referee forthwith would have ordered him to return the money to

the trustee of the bankrupt's estate. His denial served to continue the result of the conspiracy and reduce the assets of the estate. Under the circumstances, the plea of limitations sustained by Judge Thomas had no application and could not constitute *res adjudicata* here.

It is well settled that in a case of continuing conspiracy limitation runs from the commission of the last overt act.

Brown v. Elliott (1912), 225 U. S. 392, 401:

And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found.

The alleged false statement made by the defendant in error before the referee in bankruptcy, who was endeavoring to ascertain what had become of the assets of the estate, constituted an overt act, continued the conspiracy and the result thereof, and Judge Pope was clearly in error when he stated that the previous indictments and the one here under consideration were legally identical. They were not

United States v. Kissel (1910), 218 U. S. 601, 607, 608:

The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agree-

ment is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U. S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one.

* * * * *

A conspiracy is constituted by an agreement, it is true, but *it is the result of the agreement*, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. *The contract is instantaneous, the partnership may endure as one and the same partnership for years.* A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that *an overt act of one partner* may be the act of all without any new agreement specifically directed to that act.

VI.

This point is suggested by the brief of the defendant in error on his motion to dismiss:

The contentions of the defendant in error that (1) the errors assigned are insufficient, and (2) that the writ of error and citation are defective, because the names of all parties indicted are not specifically mentioned therein, are not sustained by the authorities cited.

(1) The errors assigned are simply and clearly stated, and afford sufficient basis to support the points previously argued in this brief.

(2) The defendant in error cites a number of civil cases to show that the citation and writ of error should have contained the names of all parties who are jointly indicted for the offense charged. In civil cases it is axiomatic that all necessary parties to the original cause of action shall be included, either by name or notice given, in an appeal on the merits. When necessary parties who are cast in a civil action do not desire to appeal and some of their co-defendants do, it has been held that the service of notice upon their co-defendants by the party or parties who did desire to appeal, or the appearance of all defendants, was necessary; and most of the cases cited by the defendant in error are to this effect. Those cases have no application here.

It is elementary that the Government may indict a number of parties for an offense, and if, upon investigation, it be concluded that some of them can not be convicted upon the testimony which can be

adduced, or that the Government may need the testimony, induced by promise of immunity to some who are really guilty but less culpable than others, upon which to convict the more guilty actors, it has always been held allowable for the Government to dismiss or *nol. pros.* such of the defendants indicted as it chose. This is the rule in the trial courts. Necessarily, the same rule obtains in the matter of writs of error brought by the Government. In this particular case six people were indicted; only two plead to the indictment, viz, Herman H. Oppenheimer and Herman J. Dietz (R. 44, 45). The opinion and decision of Judge Pope (R. 47) styled the case, "*The United States of America, Plaintiff, v. Jacques Samuels, Joseph Samuels, Abraham Samuels, Herman J. Dietz, Charles Hepner, and Herman H. Oppenheimer, Defendants, No. 7-278.*" The caption of the order of Judge Hand (R. 49) was in the same style, and yet the last paragraph of that order read:

Ordered and adjudged, that the motion to quash made *by the defendant, Herman H. Oppenheimer*, be granted, and the indictment is hereby quashed and the *defendants* allowed to go without day thereunder.

Naturally, the court had no power to discharge defendants, who had, so far as the record discloses, neither been arraigned nor even entered appearance before it. The citation in error (R. 51) was indorsed, "*United States of America v. Herman H. Oppenheimer, et al.*" The writ of error (R. 1) runs as to *Her-*

man *H. Oppenheimer et al.*, and is indorsed (R. 2) in like style.

The Government chose only to bring its writ of error as to Herman H. Oppenheimer, one of the six defendants indicted, one of the two entering appearance, and the only one mentioned by name in the court's order of discharge. That was its privilege; the other defendant arraigned, Herman J. Dietz, was not a necessary party to this proceeding, and the time within which writ of error might have been perfected as to him has long since expired. The principle that governs in all of the civil cases cited by the defendant in error has no bearing here. The citation and the writ of error, while they did not bear the names of all the parties indicted, nor even of the two arraigned in the preliminary proceeding, were amply sufficient to bring the defendant in error before this Court, and the right of the United States to do so can not be defeated by the citation of a number of decisions in civil cases involving the presence of necessary parties to the suit when the appearance of Herman H. Oppenheimer alone is necessary to the prosecution of this writ of error.

In a criminal proceeding, while jointly brought and tried, each party charged stands upon his own defense. A number may be jointly indicted; some acquitted, the indictment dismissed as to some, others convicted, some of them appeal, and others accept sentence and decline to do so. Any convicted man may appeal, but he is under no

compulsion of law to do so because his fellow convicts may. Neither is the Government under any legal obligation to bring writs of error as to all defendants obtaining a favorable decision on a preliminary plea because it brings the matter up as to one or more. The right of the Government to come to this Court, circumscribed as it is, can not be further abridged by applying the legal principles governing civil proceedings to its only remedy in criminal cases. No defendant was sought to be brought before this Court save Herman H. Oppenheimer, and he is properly here.

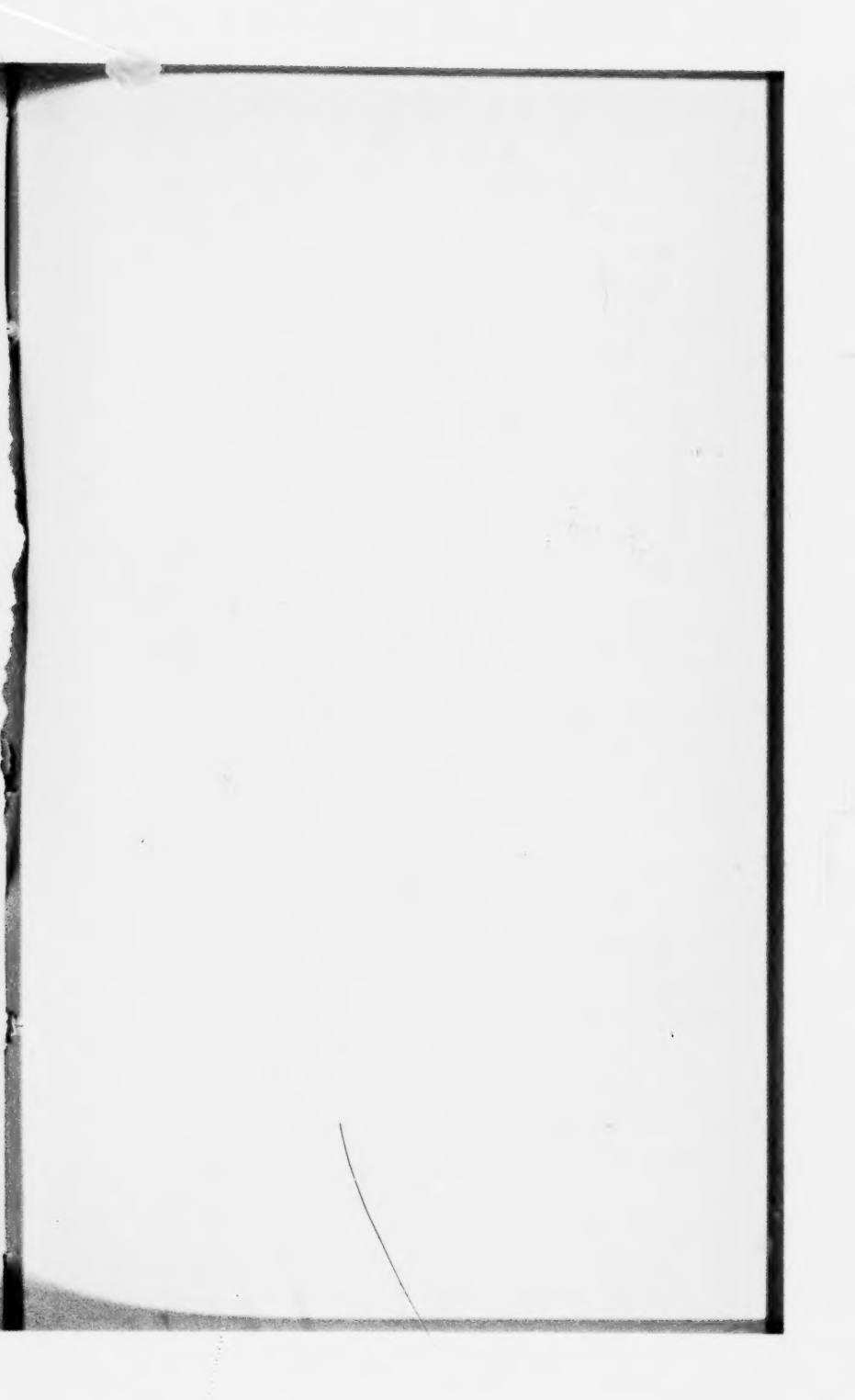
CONCLUSION.

It is respectfully submitted that the case should be reversed and the defendant ordered to stand for trial.

CHARLES WARREN,
Assistant Attorney General.

A. J. CLOPTON,
Attorney.

OCTOBER, 1916.



In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

No. 412.

HERMAN H. OPPENHEIMER ET AL.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Under the misleading caption "Errors and omissions in Government's statement of facts," the defendant in error (Brief, pp. 1, 2) suggests several additions on pages 3, 4, 5, and 8 to the statement of the case made in the Government's brief. The statement of the case prepared by the Government in its brief was made in strict accordance with paragraph (1), section 2, of rule 21, to the effect that the brief shall contain:

A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

There is nothing to prevent the defendant in error from preparing and submitting a statement of his own if he is not satisfied with that prepared by the Government. The statement of the case is not supposed to set out the whole record, as defendant in error seemingly supposes.

He further states (Brief, p. 2) that the statement by the Government "that ' Judge Pope overruled the demurrer in toto ' is absolutely incorrect; " and that (Brief, p. 2) the statement on page 17 of the Government's brief is erroneous, viz, that the lower court rendered its decision solely on the latter plea (the motion to quash).

The point is not material; but the Government calls attention to the opening and closing sentences of Judge Pope's opinion (Record, pp. 47-49) and to the wording of the order entered (Record, p. 49).

In reply to Point II (motion to dismiss) on defendant in error's brief.

On pages 13 and 14 of his brief, the defendant in error cites a number of Supreme Court cases to sustain his contention that the construction of a statute must be involved even though the case had been brought up under that paragraph of the criminal appeals act providing that a review may be had of a " decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," adding (p. 14):

In these cases, the construction of the third section of the act was not always involved.

It may be noted that the third section or paragraph of the act as to special pleas in bar was involved in but one of the cases cited (*United States v. Mason*, 213 U. S. 115), the others coming up on writs of error to review the action of trial courts sustaining demurrers to indictments.

The defendant, however, does not explain *United States v. Barber* (219 U. S. 72), in which no construction of any statute was involved at all. The Government's whole contention was that the plea of limitation set up and erroneously sustained in that case as a plea in abatement was in fact and in law a special plea in bar; and that therefore this court had jurisdiction under the criminal appeals act. The court sustained this contention that the plea in abatement was in reality a plea in bar and had been erroneously pleaded, and held (p. 78): "The motion to dismiss the writ of error for want of jurisdiction is overruled." No question of the construction of Rev. Stat., section 5440, on which the indictment was founded, was discussed or involved in the Government's brief on this point of jurisdiction or by the court on this branch of its opinion. The court stated the point at issue as follows:

Only the action of the court on the fourth count is open for consideration [i. e., the judgment sustaining the alleged plea in abatement.]. (Insertion ours.) It is for the purpose of correcting such action that the United States has prosecuted this writ, do-

ing so upon the assumption that the judgment complained of is embraced within the third class of judgments which it is provided by the act of March 2, 1907, c. 2564, 34 Stat. 1246, may be removed to this court by writ of error, viz, a judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy."

In reply to Point I (on the writ of error) on defendant in error's brief.

In *United States v. Barber* (219 U. S. 72) it is true that Mr. Chief Justice White did say, as quoted by defendant on page 28 of his brief (p. 78):

As said by counsel for the Government, "the plea of the statute of limitation does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant the judgment is necessarily an acquittal of the defendant of the charge, * * *."

But, he also said (p. 78):

Many propositions have been urged at bar in support of the contention that the judgment complained of was erroneous. We find it necessary, however, to consider but one, wherein it is claimed that "a special plea in bar is not permissible in a criminal case, but the defense of the statute of limitations must be made under the general issue." This contention, as applied to the character of case now under consideration, must be sustained, upon the authority of the recent decision in *United States v. Kissel*, 218 U. S. 601. In

that case it was held that where an indictment charges a continuing conspiracy, which is expressly alleged to have continued to the date of the filing of the indictment, such allegation must be denied under the general issue, and not by a special plea, * * *

Necessarily, if a plea can be set up only under the general issue, it can not be considered until a jury had been sworn, and testimony introduced or evidence adduced to support the plea. In such case, the defendant would have been placed in jeopardy, and no review could be had under the third section of the criminal appeals act; and in such case the above expression, quoted by the defendant in error to the effect that a judgment on plea in bar is "necessarily an acquittal," would of course be correct. But Judge Thomas's decision sustaining the plea of statute of limitations to an indictment charging a completed (not a continuing) conspiracy was not rendered *after* but *before* jury trial. Hence, it clearly was not an "acquittal," in the sense in which that word was used by the court, *supra*.

As to the quotations from congressional debates appearing on defendant in error's brief, pages 10 to 12, it need only be said that the manner of their presentation is the best illustration of the wisdom of the rule laid down by this court against referring to congressional debates for construction of a statute.

The debates on this bill in its various stages and with various amendments made to it occurred on

February 4, 1907 (Cong. Rec., vol. 4, part 3, pp. 2190 to 2197) ; on February 12, 1907 (*ibid*, pp. 2745 to 2763) ; on February 13, 1907 (*ibid*, pp. 2818 to 2825)—covering, therefore, 35 pages of the Record.

The quotations made from speeches by the various Senators during the debate, cited on the defendant in error's brief, are isolated passages occurring on different days and in different connections, and can not be understood unless read in connection with the whole debate at the particular stage of the bill at which they were uttered.

It is plain that there is no doubtful language used in the third paragraph of the statute *as enacted* and that the right to take a writ of error " from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy " is given in explicit and unconditional language.

On page 33 of his brief defendant in error quotes Wells on Res Adjudicata, section 274, to show that the sustaining of a plea of limitation constitutes *res adjudicata*. He might also have quoted sections 407 and 408, portions of which read (p. 318) :

SEC. 407. We have passed over the ground relating to parties and issues in personal actions of a civil nature and come now to the application of the same principles to public prosecutions. These are *sui generis*, especially in one particular, as to the bearings of this subject, namely, a want of mutuality which is regarded as an essential ingredient in the doctrine of *res adjudicata* as to civil personal actions.

SEC. 408. The principal—which is parallel to the principle prevalent as to the fundamental rule in civil cases—is *that no one shall be twice put in jeopardy for the same offense*. And, accordingly, the primary inquiry under it is, when does jeopardy attach so as to be a bar to any subsequent prosecution? The boundary line generally observed seems to be the point where the case is given to the jury for decision.

This sustains the Government's contention that the only equivalent in the criminal law to the doctrine of *res adjudicata* in the civil law is the doctrine of jeopardy.

Cases cited by defendant in error in his brief (pp. 28-39) to sustain his contention that the doctrine of *res adjudicata* applies in a case like that at bar are all to be brought within one of the three following classes, none of which are pertinent:

- (a) Cases of judgments in civil causes;
- (b) Cases where a judgment rendered *after trial* in a criminal case has been held to be conclusive in another trial involving the same question and the same parties;
- (c) Cases determined under criminal codes containing specific provisions differing from common-law doctrines.

The case of *Rex v. Duchess of Kingston* (1776), 20 State Trials 538, relied on by defendant in error, involved the question whether a judgment of annulment or jactitation of marriage rendered *after trial* in a spiritual court was conclusive in a sub-

sequent trial in a common-law court of one of the parties for bigamy.

Of the other criminal cases *cited* by defendant in error (other than those decided under criminal codes), it is believed that all were cases of the effect of a *judgment rendered after trial* (with the possible exception of *Regina v. Houston* (1841), 2 Crawford & Dix 310—a decision in Cases ruled on Circuits in Ireland). With reference to the latter case, it may be said that it is not in point, except as an example of English criminal practice with reference to the difference between the effect of pleas or demurrers in misdemeanor and in felony cases, see Chitty, pp. 434, 435, 441, 442, 443 (incompletely quoted by defendant in error on his brief, p. 30).

An expression used by Mr. Justice Pitney in *Frank v. Mangum* (1915) (237 U. S. 309), *not cited by defendant in error on his brief*, may seem, on its face, more favorable to his contention than any case cited by him.

Mr. Justice Pitney said (pp. 333, 334):

It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction can not afterwards be disputed between the same parties. *Southern Pacific Railroad v. United States* (168 U. S. 1, 48).

The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.

With reference to these remarks, the Government desires to point out: First, that they were made as *dicta*—for the Justice continued (p. 334): “However, it is not necessary, for the purposes of the present case, to invoke the doctrine of *res adjudicata*”; second, the citation of the case in 168 U. S. shows the sense in which the remarks were to be taken. The case cited was a civil cause of action (as were the numerous cases cited in it) and held that “a right, question, or fact distinctly *put in issue* and directly determined by a court of competent jurisdiction *as a ground of recovery*, can not be disputed in a subsequent suit between the same parties or their privies.” [Italics ours.] This familiar doctrine unquestionably applies in both criminal and civil cases, but goes no further than other cases cited by defendant in error which hold that a matter *put in issue* and resulting in a judgment *after trial* is conclusive in a subsequent trial.

This is far from establishing a doctrine that a ruling *before trial* in a criminal case on a point of law on a demurrer, plea, or motion to quash, is a bar to any subsequent indictment for the same offense.

Defendant in error seems to lay stress on the fact that the Government took no writ of error under the criminal-appeals act from Judge Thomas’s decision on the first Oppenheimer indictment. Lay-

Oppenheimer is alleged to have illegally received, and to have sworn falsely about, and served to continue the effect of the conspiracy. A referee in bankruptcy has full power to order the return of money or property illegally paid to his attorney by a bankrupt upon proper application from the trustee of the estate.

See *Knapp & Spencer Company v. Drew* (1908), C. C. A., 8th Cir., 160 Fed. 413, 415, 416:

Appellant first contends that it was an adverse claimant of the money in question and could not be proceeded against summarily by motion, but was entitled to defend itself and justify its adverse claim in a plenary suit instituted by the trustee for the recovery of the money. This position, we think, is totally untenable. Appellant made no such claim in its original answer to the order to show cause. *On the contrary it denied positively and under oath that it had ever received the money from the bankrupt as charged.* Notwithstanding there was no issue of an adverse claim to the money tendered or joined the referee took occasion to say in his finding that appellant's possession of the money was "without color or right."

See also Collier on Bankruptcy (1912), page 595:

Under this clause, it has been held that the referee may grant stays, appoint receivers, issue summary orders to compel restitution of property, * * *.

See also *Mueller v. Nugent* (1901), 184 U. S. 1.

Defendant in error attempts to becloud the point raised by asserting that the testimony before the referee hereinabove referred to shows that he admitted receiving \$1,200 from Joseph Samuels & Co., as attorney (Brief, pp. 43, 44). Oppenheimer did admit receiving \$1,200 on account of prior services from the firm of Joseph Samuels & Co. in the latter part of *July* (Record, 30); but he afterward modified his statement and said (Record, 39) that he received \$1,235 "for the services I had rendered to the sister at the request of Jacques Samuels. After the close, no. I think I was paid before the 20th, before I knew of the insolvent condition."

But he is alleged to have received the note for \$897.36, belonging to the estate of Joseph Samuel & Co., on or about *September 1, 1912*, after the petition in bankruptcy had been filed and a receiver of the Samuels company appointed. Taking this note under such circumstances constituted an offense against the bankruptcy law (*Knapp v. Spencer, supra*), and if he swore falsely that he received nothing for his legal services after the institution of bankruptcy proceedings, as the indictment alleges, he is unquestionably guilty of an *active* overt act to continue the effect of the conspiracy, and not, as is said in his brief (p. 44), of "only a *passive* recital of 1914 of an alleged act in 1912."

The indictment on its face clearly sets out a continuing conspiracy, and whether Oppenheimer received the note, as charged therein, is a matter

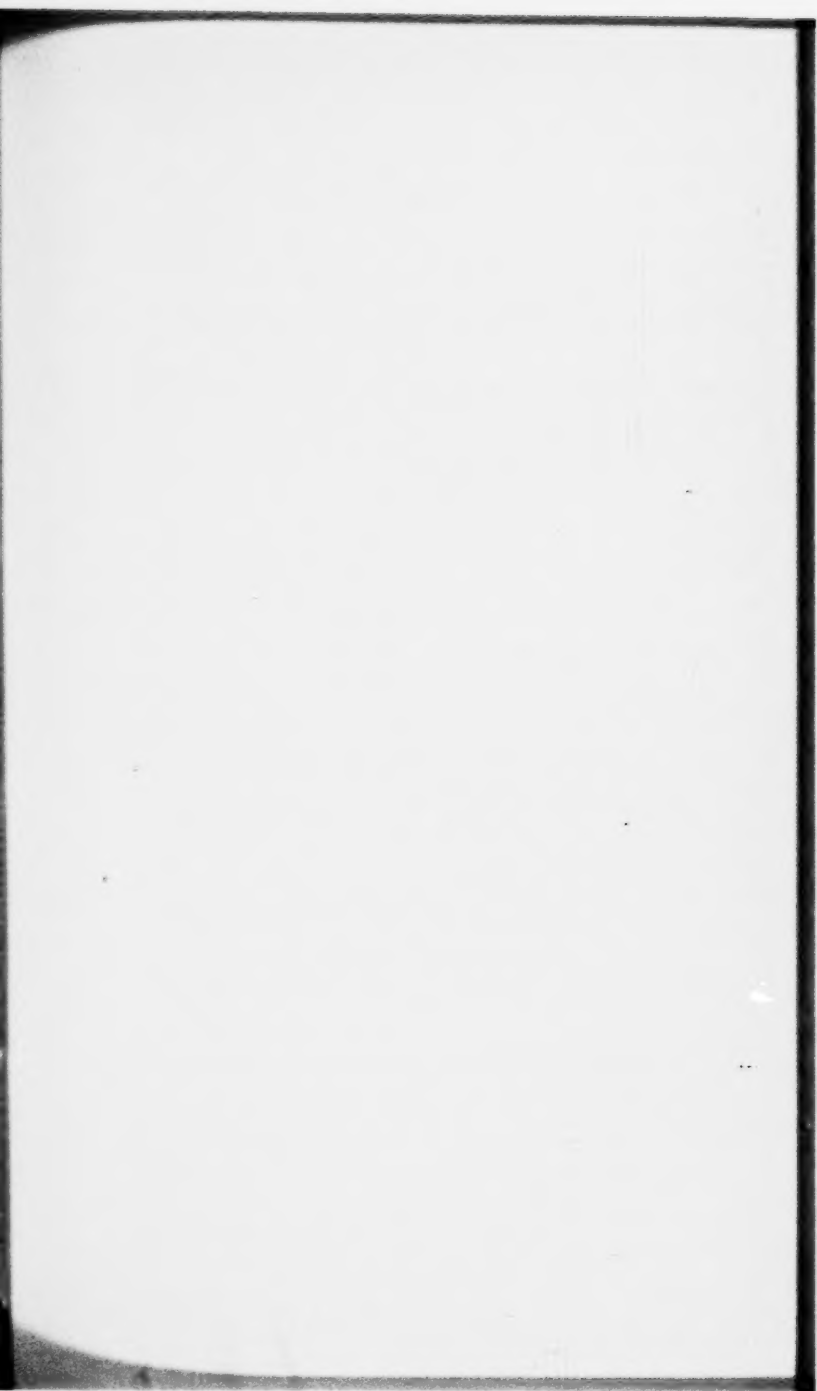
which can only be determined by the jury when the case is *tried* in the court below. The only point involved under defendant in error's plea of *res adjudicata* is that the indictments are the same; and the Government is entitled to a review of that question. Assuming that the first indictments charged a completed conspiracy, the Government now presents an indictment charging a continuing conspiracy; and it is necessary for the court to determine whether it does or not, for if it does, a decision on the one could not be considered as being a bar to a trial on the other, even if it could be so treated, were the indictments the same, where there had been no jury sworn, no jeopardy had attached, and no *trial* had been had.

Respectfully submitted.

CHARLES WARREN,
Assistant Attorney General.
A. J. CLOPTON, *Attorney.*

OCTOBER, 1916.







NEW YORK CO.
F. B. L. H.
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JAMES H. M.

No. 412.

Supreme Court of the United States

OCTOBER TERM, 1916.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

HERMAN H. OPPENHEIMER, et al.

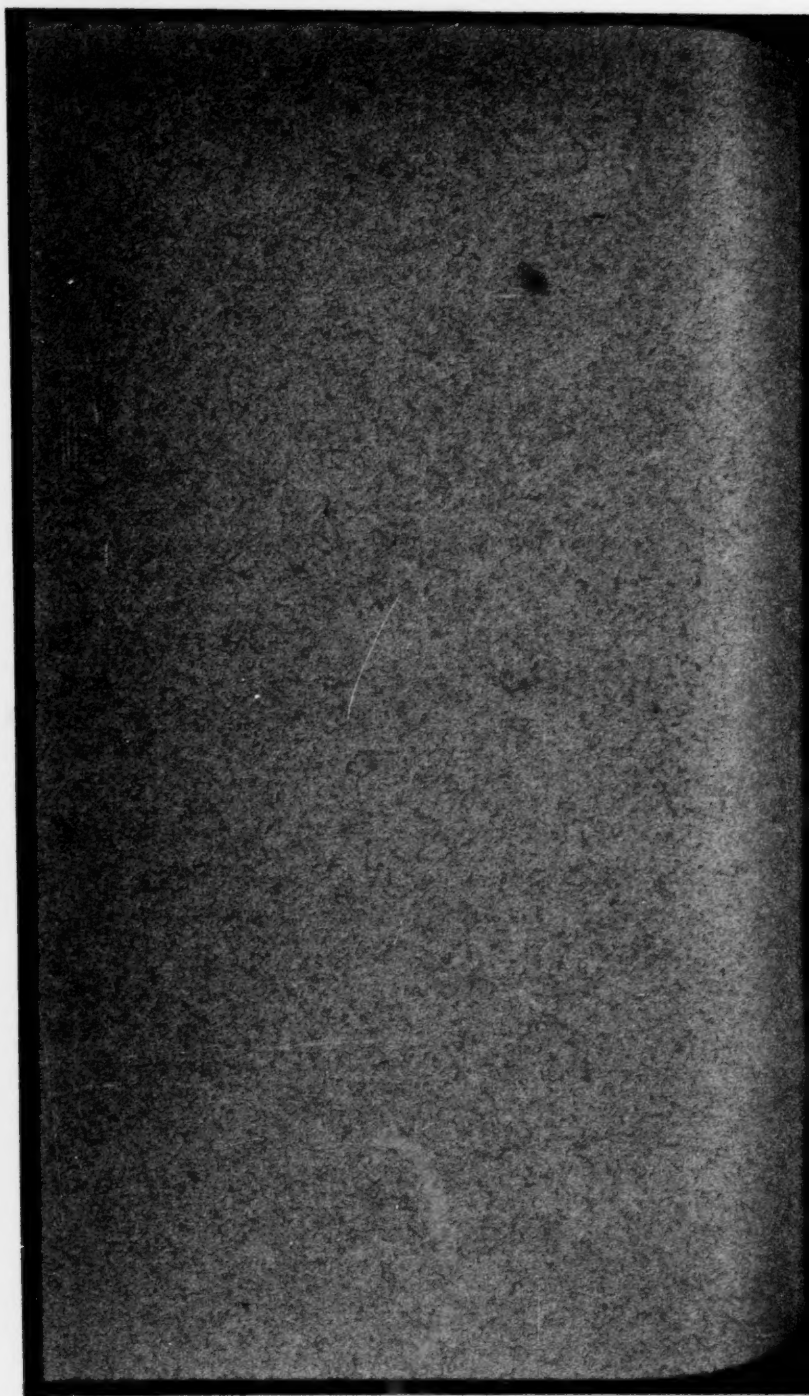
HERMAN H. OPPENHEIMER, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

On Motion to Dismiss.

On Writ of Error.



INDEX AND SUMMARY.

	PAGE
ERRORS AND OMISSIONS OF GOVERNMENT IN STATEMENT OF FACTS	1
THE QUESTIONS INVOLVED.....	3
THE ARGUMENT ON MOTION TO DISMISS.	
POINTS:	
POINT I.—The pleadings below were entitled and ad- judicated as “Demurrer” and “Motion to Quash.” They were not “a plea in bar.” This Court will not construe pleadings and hold a demurrer or motion to quash to be anything else, unless it clearly ap- pears that:	
(A) “The decision entered was based upon the construc- tion of the statute upon which the indictment is founded.” United States vs. Adams Express Co. (1912), 229 U. S., 381; Gov. Brief, page 15, or	
(B) “The Court in the judgment expressly placed its de- cision that the United States could not prosecute the defendants, upon the plea of the bar of limitations.” United States vs. Barber, 219 U. S., 72; Gov. Brief, page 16	5
POINT II.—The jurisdiction of this Court is limited by the criminal appeals act of March 2nd, 1907, to the consideration only of decisions of the Courts below construing statutes, and cannot be used for the purpose of correcting other errors.....	7
POINT III.—The action of the Court below was not based upon the construction or validity of any statute	16

	PAGE
POINT IV.—The writ of error, assignment of errors and citation are defective, because they do not bring before this Court all the proper parties, they omit the names of some of the parties, and are insufficient to raise the only point appealable in such appeals as this, and are too general.....	23
 THE ARGUMENT ON WRIT OF ERROR.	
POINTS:	
POINT I.—The action of the lower Court in holding that the prior judgment was a bar to the prosecution of the last indictment was correct.....	28
POINT II.—The present indictment in the case at bar, in legal effect, is exactly the same as the one before Judge Thomas. It contained no new matter which constituted either a new crime or a new overt act..	40
CONCLUSION	45
The Writ of Error should be dismissed or the judgment affirmed	45

CASES CITED.

	PAGE
<i>American Security Co. vs. District of Columbia</i> , 224 U. S., 491	15
<i>Archibald's Crim. Pl. & Ev.</i> , 21st Edition, 149.....	33
<i>Bell vs. Mayor</i> , 105 N. Y., 139.....	14
<i>Bishop's New Crim. Procedure</i> , Vol. 2, Section 78 and note	30
<i>Bissell vs. Spring F.</i> , 124 U. S., at 232-3.....	36
<i>Blake vs. National Banks</i> , 23 Wallace, 307.....	12
<i>Bouchard vs. Dias</i> , 3 Denio (N. Y.), 238.....	36
<i>Black, In re</i> 160 Fed. Rep. 231	43
<i>Chitty Crim. Law</i> , Vol. 1 (1816) pages 442-443.....	30
<i>Code Crim. Pr. State of N. Y.</i> , Sec. 327.....	31
<i>Commonwealth vs. Ellis</i> , 160 Mass., 165.....	35
<i>Commonwealth vs. Gould</i> , 12 Gray (Mass.) 171-173.....	34
<i>Cong. Rec.</i> , Vol. 41, Part 3, pages 2191, 2192, 2821, 2823..	10
<i>Coffey vs. U. S.</i> , 116 U. S., 436.....	36
<i>Davenport vs. Fletcher</i> , 16 How., 142.....	25
<i>Deneale vs. Archer</i> , 8 Pet., 526.....	25
<i>Detroit, etc. vs. Mich. R. R.</i> , 240 U. S., 571.....	34
<i>District of Columbia vs. Brewer</i> , 37 Wash. Law, R., 64..	38
<i>Duchess of Kingston's case</i> , 20 State Trials at 538, etc....	37
<i>Galston vs. Hoyt</i> , 3 Wheat, 316.....	36
<i>Godbe vs. Tootle</i> , 54 U. S., 576.....	25
<i>Hardee vs. Wilson</i> , 146 U. S., 179.....	25
<i>Holy Trinity Church vs. U. S.</i> , 143 U. S., 457.....	12, 14
<i>H. R. 1907</i> , 15, 434.....	9
<i>Iowa vs. Fields</i> , 106 Iowa, 406.....	32
<i>Jennison vs. Kirk</i> , 98 U. S., 458.....	12
<i>Jones vs. U. S. ex rel Tompkins</i> , 135 Fed., 518.....	24
<i>Kaile vs. Wetmore</i> , 6 Wall, 451.....	26
<i>Lamar vs. United States</i> , 240 U. S., 60.....	34
<i>Miller vs. Mackenzie</i> , 10 Wall, 582.....	25
<i>Moore vs. Simons</i> , 100 U. S., 145.....	26
<i>Mt. Vernon Cotton Co. vs. Alabama P. Co.</i> , 240 U. S., 30.	34
<i>Mussina vs. Cavazos</i> , 6 Wall., 355.....	25
<i>Northern Pacific Bank vs. Slagt</i> , 205 U. S., 122.....	33
<i>Oglesby vs. Attrill</i> , 14 Fed. Rep., 214.....	39
<i>Queen vs. Houston</i> , 2 Crawford & Dix, 310.....	30, 36
<i>Reg vs. Miles</i> , 17 Cox C. C., 9.....	
<i>Reg vs. Haughton</i> , 1 El. & Bl., 501.....	36
<i>Rex vs. Duchess of Kingston</i> , 20 Howell State Trials, 538, etc.	37
<i>Rex vs. Brown</i> , 17 Cox C. C., 79.....	36
<i>Salas vs. U. S.</i> , Fed. C. C. A., 2nd Cir., June, 1916....	42

	PAGE
<i>Simpson vs. First Natl. Bank</i> , 129 Fed., 257.....	24
<i>Smith vs. Hopkins</i> , 120 Fed., 921.....	24
<i>Smith vs. People</i> , 47 N. Y., 331.....	14
<i>Smythe vs. Strader</i> , 12 How., 327.....	25
<i>State vs. Wear</i> , 145 Mo., 162.....	36, 38
<i>Stephen's Digest of Crim. Pr.</i> , Art. 258, page 171.....	30
<i>Stevenson vs. Barbour</i> , 140 U. S., 48.....	24
<i>Sea vs. Conn. Mutual Life</i> , 154 U. S., 659.....	26
<i>State vs. Field</i> , 106 Iowa, 496.....	32
<i>Turner vs. Farmers L. & T. Co.</i> , 106 U. S., 552.....	19
<i>Trust Co. vs. Grant Locomotive Works</i> , 135 U. S., 207..	19
<i>The Protector</i> 11 Wall, 82.....	26
<i>The Protector</i> vs. <i>Adams Ex. Co.</i> , 229 U. S., 381.....	5
<i>United States vs. Barber</i> , 219 U. S., 72.....	28
<i>United States vs. Barnow</i> , 239 U. S., 74.....	21
<i>United States vs. Briggs</i> , 211 U. S., 507.....	21
<i>United States vs. Bitty</i> , 208 U. S., 393.....	9
<i>United States vs. Carter</i> , 231 U. S., 492.....	13, 15, 19
<i>United States vs. George</i> , 228 U. S., 14.....	13
<i>United States vs. Keitel</i> , 211 U. S., 370.....	14
<i>United States vs. Kössel</i> , 218 U. S., 601.....	7
<i>United States vs. Moist</i> , 231 U. S., 702.....	21
<i>United States vs. Patten</i> , 226 U. S., 525.....	14
<i>United States vs. Stevens</i> , 215 U. S., 190.....	13
<i>United States vs. Waldmøre</i> , 179 Fed., 753.....	44
<i>United States vs. Pettibone</i> , 148 U. S., 193.....	43
<i>United States vs. Hyde & Sneider</i> , 225 U. S., 348.....	42
<i>United States vs. Lonabaugh</i> , 179 Fed., 476.....	43
<i>United States Supreme Court</i> , Rule 21 Sub., 2, 4.....	24
<i>Wharton's Cr. Pl. & Pr.</i> , 9th Ed., Section 406.....	29
<i>Wells on Res Adjudicata</i> , Sec. 274.....	33

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

against

HERMAN H. OPPENHEIMER, et al.

THE UNITED STATES OF
AMERICA,

against

JACQUES SAMUELS, JOSEPH SAM-
UELS, ABRAHAM SAMUELS,
HERMAN J. DIETZ, CHARLES
HEPNER and HERMAN H. OP-
PENHEIMER,

Defendants.

Case Number
442. 412
October Term
1916.

**ERRORS AND OMISSIONS IN GOVERN-
MENT'S STATEMENT OF FACTS.**

Page 3, Government's brief, we add point that the present indictment December 21st, 1914, was returned after the time to obtain a writ of review of the order of Judge Thomas on the previous indictment had expired.

Page 4 of Government's brief; we add the demurrer and motion to quash set out other matter not proper in a plea in bar (R., page 36) Nos. 3 to 9.

Page 5: The pleas in bar and abatement were withdrawn only after motion by the prosecutor to strike them from the record (R., pages 42 to 45) and without prejudice, page 45. In this motion to strike from the record, the District Attorney did not claim that the demurrer and motion to quash were anything but what they were named.

Page 5: The statement by the Government that "Judge Pope overruled the demurrer in toto" is absolutely incorrect, see opinion of Judge Pope (R., page 47) and order (R., page 49) and the Government's argument of "the singularity" fails. We respectfully refer to the opinion (R., page 47), showing the decision was based on the construction of the overt acts and the effect of a final judgment and not on any statute.

Page 8: We call attention to the statement that the writ of error was seasonably filed on the last indictment, it should be noted none was filed on the first indictment (R., pages, 3, 8).

Page 9: The specifications printed are not those in the record (R., page 50). But neither set raise a reviewable question "that the Court below erred in the construction of any statute" the only question on which this Court takes jurisdiction under the Criminal Appeals Act.

Page 17 (Government's brief). The statement that "the lower Court rendered its decision solely, on the latter plea" (the motion to quash) is not borne out by the decision itself which clearly makes no reference to which plea was sustained, it may have been the demurrer.

Other misstatements of facts in Government brief are pointed out in our brief, page 44:

THE QUESTIONS INVOLVED.

(On Motion to Dismiss.)

I. Was the motion to quash and demurrer which were decided below a "plea in bar?"

The government practically admits by its brief that if the matter below was decided on a motion to quash or demurrer, and the decision did not construe a statute, the writ of error must be dismissed.

II. But contends the motion and demurrer was a "plea in bar" and that as such, it was appealable whether or not the decision involved a construction of a statute.

III. The defendant contends the matter below was decided as a motion to quash and demurrer and the decision did not construe any statute, and

IV. That whether as a demurrer, motion to quash, or plea in bar, it was not appealable unless the government first raised a reviewable question by its writ of error, and second, unless the decision construed a statute.

V. Defendant in error contends that the citation and writ of error are defective and improper, leaving only one person indicted on a conspiracy indictment, and do not bring any of the other defendants here. The order dismissed the indictment as to all.

The government contends it can bring up on appeal one at a time—or all.

(On Writ of Error.)

I. Defendant contends, that the Court has repeatedly said it will not entertain an appeal unless the decision of the lower Court construes a statute, hence that it will not go into this case to see if the Judge below was right in upholding the effect of the former judgment, but that if this Court does go into that question, it will find that the action of the Court below was proper.

II. That this Court will not go into the construction or sufficiency of the overt acts or the indictment to ascertain whether they were the same as in previous indictments or well alleged overt acts, but that if it does, it will find this indictment legally identical with the former, and the new overt act not an act at all and that section 37 of the Code nor any section or statute was construed, and will therefore sustain the Court below.

The questions raised by government on page 10 of its brief numbered I, III and IV, are not in this case.

POINT I.

(Motion to Dismiss.)

The pleadings below were entitled and adjudicated as "Demurrer" and "Motion to Quash." They were not "a plea in bar." This Court will not construe pleadings and hold a demurrer or motion to quash to be anything else, unless it clearly appears that:

(A) "The decision entered was based upon the construction of the statute upon which the indictment is founded." United States vs. Adams Express Co. (1912), 229 U. S., 381; Gov. Brief, page 16, or

(B) "The Court in the judgment expressly placed its decision that the United States could not prosecute the defendants, upon the plea of the bar of limitations." United States vs. Barber, 219 U. S., 72; Gov. Brief, page 16.

The government relies on these two cases as conclusive that this court will *in all cases construe* on writ of error the pleadings below, even when there is no construction of a statute by the lower court. Defendant in error believes the words set forth above, and quoted in government's brief, pages 15-16, shows clearly that there must be something more than a mere improper designation of the pleas in order to move this Court; the decision below

must clearly be based upon the construction of a statute. Otherwise the Court will not construe the pleadings.

The facts pleaded in the demurrer and motion to quash to the effect that the new overt act alleged in the last indictment never occurred (as shown by the court records), and that they were insufficient, *could have no proper place in a plea in bar*, they were matter to the effect that the indictment did not state a crime and that there were no new overt acts alleged.

Even if it were found that the court had passed on a demurrer and motion to quash which contained matter which might have been set up in a plea in bar, there could be no review unless the decision below contained the prerequisites at the head of this brief, for as pointed out in government's brief, page 13, *Durland vs. United States*, 161 U. S. 305, 314, "objections raised by a motion to quash are addressed to the discretion of the court, and the refusal to quash is not generally assignable as error," so that while not reviewable generally they only can become so by the decision of the lower court construing a statute even when they contained matter which might be set up in a plea in bar.

Since therefore the decision below in this case does not bring it within the rule announced in the two cases in government's brief, we submit the appeal should be dismissed.

POINT II.

(Motion to dismiss.)

The jurisdiction of this Court is limited by the criminal appeals act of March 2nd, 1907, to the consideration only of decisions of the Courts below construing statutes, and cannot be used for the purpose of correcting other errors.

The contention of the Government appears to be that a decision sustaining a plea in bar is reviewable irrespective of whether the construction of a statute is involved, basing its contention upon the third section of the statute, which is as follows:

“From a decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy.”

And the fact that this section does not contain the limitations upon the right to appeal, prescribed in the first two sections.

We think that the decision of this Court in the matter of the *United States vs. Kissel*, 218 U. S., 601, is a complete answer to the contention, and determinative against the Government, on the application to dismiss the writ of error on the question as to the right to review the judgment below, even if the pleadings were held to be a plea in bar, for in that case the Court held, at page 606:

“We deem it unnecessary to state the pleadings with more particularity because the only question before us under the Act of March

2nd, 1907, C. 2564; 34 Stat., 1246, is whether the plea in bar can be sustained. That this Court is confined to a consideration of the ground of decision mentioned in the statute when an indictment is quashed, was considered in *United States vs. Keitel*, 211 U. S., 370, 399.

We think that there is a similar limit when the case comes up under the other clause of the act, from a 'judgment sustaining a special plea in bar when the defendant has not been put in jeopardy.' This being so, we are not concerned with the technical sufficiency or redundancy of the indictment or even in the view that we presently shall express, with consideration of the nature of the overt acts alleged." (Italics ours.)

It would seem that this language is too clear to admit of construction.

In view of the insistence of the Government in its brief (page 24),

"that the contention is without merit and the expression quoted wholly misconstrued"

by defendant in error, a statement neither convincingly explained nor supported by argument or citation, we deem it advisable to submit extracts from the history of the statute, and discuss its construction as it has been passed upon by this Court, in order to show conclusively that this Court has properly construed the section in question in the *Kissel* case.

In one of the earliest cases in this court under the statute, this Court recognized the purpose of

the entire act, holding in *United States vs. Bitty*, 208 U. S., 393, at page 400, Mr. Justice Harlan writing the opinion :

"If a court of original jurisdiction errs in quashing, setting aside or dismissing an indictment for an alleged offense against the United States upon the ground that the statute upon which it is based is unconstitutional, or upon the ground that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review; *hence, that there may be no unnecessary delay in the administration of the criminal law and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced, the above Act of March, 1907, was passed.*" (Italics ours.)

And this was the sole purpose of the act as appears in the debates in Congress.

The statute originated in the House of Representatives (H. R., 1907, 15,434) and as originally introduced it was intended to give as broad a power of appeal to the Government as that given to the defendant.

Upon being reported by the Judiciary Committee of the Senate, it had been amended so that its sponsors declared the purposes of the bill to be to give the Government a right to review only questions embracing the validity and construction of statutes, for we find in the debates the following

statements of its purpose (Cong. Rec., Vol. 41, Part 3, page 2192, Col. 1):

Mr. Bacon: In the case where a man is indicted and he is brought before the Court and a demurrer is interposed before he is arraigned, upon the ground that the law under which he is charged with the commission of the crime was unconstitutional, utterly null, and void, the Judge sustains that demurrer and discharges the prisoner. Now, if that affected only one prisoner, it would be a matter of comparatively slight importance; but it not only affects that prisoner—not only affects the accused in that particular case—but it affects all other persons who may assume to violate the same law; and a law of Congress is set aside, made absolutely null and void and inoperative by the decision of our Judges, without the opportunity for the nine Judges who sit in the Supreme Court to pass upon the great question whether or not the law solemnly enacted by Congress is or is not constitutional, affecting not simply that accused, affecting not simply all others who may be accused, but affecting the operation of the law of the land, and affecting all interests which are to be affected by that law, and utterly destroying all the protection which that law seeks to throw over the persons, the property, and the transactions of all citizens of the United States.

And again at page 2191, col. 2:

“Mr. Mallory: In reference to the point, the Senator is on I should like to call his atten-

tion to the provision overruling or sustaining a special plea in bar in the following language: 'From a decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy,' I am asking merely for information, not with any intention—

Mr. Bacon: That language was inserted in the bill just out of abundance of caution."

Mr. Clarke of Arkansas (page 2821, col. 2): I merely want to say to the Senator from Nevada that after he left the chamber the bill was amended so as to limit its scope to questions that involve the constitutionality and construction of statutes. Therefore there is no great danger now that anybody will be very seriously oppressed by the bill in its present condition. Under the bill, the inquiry is limited to questions of law—not questions of law generally, but only such as involve the constitutionality of and construction of statutes." (Ital. ours.)

Senator Clay (page 2823, col. 1): I wish to ask the Senator in charge of this bill a question * * * As I understand the bill now, the Government can only appeal in a case where a demurrer has been sustained or where an indictment has been quashed or where there has been a conviction or arrest of judgment when the constitutionality or the validity of the act is involved.

Mr. Nelson: That is substantially it, etc.

Mr. Clay: Before the amendment was adopted the bill provided that in all criminal cases where a demurrer has been sustained or an indictment quashed, regardless of the validity of the act, there should be an appeal, but

now these amendments allow the Government to appeal simply in cases where the constitutionality of the act is questioned.

Mr. Nelson: When the validity of the Statute under which the indictment is framed is involved.

Mr. Spooner: Or its construction."

Thus the history of the act indicates clearly that the only purpose of the act in its entirety was to enable the Government to secure a review upon the construction or validity of a statute upon which an indictment was founded, to the end that legislation by Congress should not be rendered abortive by the action of a nisi Judge, and that it was not intended by any section of the act to open up other fields of review. The act was considered as an entirety, leading to the purpose sought to be achieved, and no one part was singled out as giving greater jurisdiction than another. This so clearly appears by the debates that further argument would be a work of supererogation.

There can, of course, be no question that this Court may refer to the records of Congress to ascertain the intent and meaning of legislation. * * *

Holy Trinity Church vs. United States,
143 U. S., 457, 464.

Blake vs. National Banks, 23 Wallace,
307, 317, 319.

Jennison vs. Kirk, 98 U. S., 458, 460.

Its intention being thus ascertained, it shows beyond peradventure that it was not intended even by the third section to open up fields of review other than those in which the validity and con-

struction of a statute were involved. In all its decisions upon this statute the Court has recognized the evident purpose of the act.

United States vs. Bitty (*supra*).

United States vs. Stevens, 215, U. S., 190.

Mr. Justice Day, writing the opinion, page 196:

"The object of the Criminal Appeals Statute was to permit the United States to have a review of statutory construction in cases where indictments had been quashed, or set aside, or demurrers sustained thereto, with a view to prosecuting offenses under such acts when this Court should be of opinion that the Statute properly construed, did in fact embrace an indictable offense. * * *

As the general question of law involved in the decision of the Court below is not within either of the classes named in the statute giving a right of review in this Court, we must decline to consider it upon this writ of error."

And again in United States vs. George, 228 U. S., 14, Mr. Justice McKenna writing, page 19:

"This statute seems to require an explicit declaration of the law upon which an indictment is based and a ruling on its validity and construction."

These are followed in all of the cases:

United States vs. Carter, 231 U. S., 492.

United States vs. Biggs, 211 U. S., 507-518, 522.

- United States vs. Sullenberger, 211 U. S., 522.
 United States vs. Moist, 231 U. S., 702.
 United States vs. Forrester, 211 U. S., 400.
 United States vs. Herr, 211 U. S., 404.
 United States vs. Foster, 233 U. S., 515-523.
 United States vs. Keitel, 211 U. S., 370.
 United States vs. Freeman, 211 U. S., 525.
 United States vs. Mason, 213 U. S., 115.
 United States vs. Mescoll, 215 U. S., 26.
 United States vs. Patten, 226 U. S., 525-535.

In these cases, the construction of the third section of the act was not always involved. In the Kissel case (*supra*), however, the question was passed upon by the Court and the third section was held to be within the same limitations as those contained in the first two sections, thus bringing it within the intent of the legislation.

This Court will look into the act for the purpose of ascertaining the evils sought to be corrected by it and will not so construe the act as to embrace matters that were not clearly within the evils sought to be remedied.

Holy Trinity Church vs. United States (*supra*), page 472.

Smith vs. People, 47 N. Y., 331, 336.

Bell vs. Mayor, 105 N. Y., 139, 144.

And it will not assume appellate jurisdiction that was not intended, even though the wording of the act may be broad enough to give it.

American Security Co. vs. District of Columbia, 224 U. S., 491.

We therefore contend that a proper construction of the act requires that this Court adhere to its decision in the Kissel case, that the limitations prescribed in the first two sections apply equally to the third section of the act, for, were it otherwise, it would open this Court to a flood of writs demanding reviews on questions of fact or of law or both, a result that it is obvious was never within the intention of Congress.

U. S. vs. Carter, ante, p. 493,

by Mr. Chief Justice White, page 493 :

"It is settled we cannot revise the mere interpretation of the indictment and are confined to ascertaining whether the Court erroneously construed the statute and our power to revise can alone rest upon the theory that what was done amounts to a construction of the statute (*Keitel* case, 211 U. S., 371; *Stevenson*, 215 U. S., 190), but it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment."

and page 494 :

"Indeed to follow the suggestion, would be to frustrate the purposes which manifestly the

jurisdictional act was enacted to accomplish; because the intent to expedite in criminal cases the decision of questions involving statutory construction, which was plainly one of the ends for which the law was intended, would be of little avail if the review be extended by implication, so as to embrace cases not within the purview of the statute, thereby multiplying appeals and delaying speedy decisions of such cases."

The history of this Court shows that the policy of Congress has been to relieve it from deciding questions of fact and giving it its proper function, the declaration of the supreme law of the land.

Therefore, whether the matter below was decided upon a motion to quash or as a plea in bar, the same rule obtains, and unless the decision of the Court below *was based upon the construction of a statute*, there is no right to a review.

POINT III.

(Motion to dismiss.)

The action of the Court below was not based upon the construction or validity of any statute.

The opinion of Judge Pope, Record, page 47, clearly shows this point well taken.

The decision of the Court below was based upon the construction of the indictment, the Court, in effect, holding, that it was legally identical with former indictments which had been dismissed upon demurrer and that the judgment of the court on the first indictments not having been appealed

from or reversed, was conclusive on the government. In so holding, the Court was not obliged to construe any statute, as there can be no question that there is no statute defining when and under what conditions indictments are identical, no statute defining the effect to be given a judgment sustaining a demurrer to an indictment, and certainly no statute governing the court in basing its action on former adjudications. All of these are matters which must be decided on the law as evolved from the decisions of the courts upon the questions involved, and no statute gives the government the right to appeal such decisions.

The action of Judge Pope in dismissing the second indictment is expressly stated to be by him on the following grounds:

"Should the prosecution under this last indictment be allowed to proceed when there is outstanding a judgment in favor of the defendants to the effect that the statute of limitations has run against their alleged offense? The Government urges that this may be done, and further sets forth to the Court that since the decision of Judge Thomas, a decision of the Circuit Court of Appeals for this circuit, as well as a decision by the Supreme Court of the United States, has shown that the statute of limitations did not run until three years after the offense instead of one year as held by him, and that his decision was erroneous. This latter, however, does not impress me as being of relevancy, provided the defendants have heretofore been heard upon this issue, having been discharged thereunder, and that judgment being unappealed from remains in full force and

effect. The decision of Judge Thomas in my judgment becomes the law of the case, and, until reversed, protected the defendants from further prosecution arising from the same state of facts. While, of course, were the case open to decision upon the question of limitation, the decision of the Appellate Courts would control, yet the law of the case having been settled previous to these decisions, the defendants should not be subjected to another prosecution while the judgment quashing the indictment and discharging them remains in force and effect (Record, fols. 87-88). (Italics ours.)

This language is clear and unequivocal.

The distinct grounds upon which the decision is based are clearly stated. The Judge plainly disclaims any intention to construe or pass upon the validity of the statute, stating that question was not before him, and that the only question before him was the effect of the former judgment on the present indictment. Ingenuously, the government argues that the effect of the opinion and order of Judge Pope, is that it sustains the one year statute of limitations, but this contention is readily disposed of when we read the opinion of Judge Pope, for he distinctly states that if that question was before him, he would have to rule in accordance with the decision of this Court, holding that three year statute of limitations applied.

Who upheld the one year statute of limitations? Not Judge Pope, for he distinctly disclaims any such intention. The answer must be, Judge Thomas did. But there is no appeal pending from Judge Thomas' judgment. It was allowed to remain in full force and effect. If the Government had not

acquiesced in the judgment and allowed it to remain in force, but had taken an appeal, which it had the right to do, the judgment, if erroneous, could have been corrected. But what it had a right to do then, has been lost by its own action and it seeks to attain this end now, not by direct, but by the devious means of collateral attack. In other words, the Government now seeks a review of the judgment of Judge Thomas, although no appeal has ever been taken from it and the time to obtain a review has long since passed. This cannot be done.

Turner vs. Farmers' Loan & Trust Co.,
106 U. S., 552, 555.

Trust Co. vs. Grant Loco. Works, 135 U.
S., 207, 226.

To uphold the contention of the Government would in effect be providing a method of review in a manner not provided for by statute.

It is clear that the judgment sought to be reviewed is not based upon a construction of a Statute. The writ of error ought to be dismissed, for it is replete with the faults which have been found by this Court to be fatal to a review sought under the Criminal Appeals Act.

Thus in *United States vs. Carter*, 231 U. S., 492, 493, this Court held, Mr. Chief Justice White, writing:

"Our power to review the action of the Court, then, in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were

quashed, were bad in law, did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment. It is, however, insisted on behalf of the United States, that by referring to the counts which were held good and comparing them with those which were quashed, by a process of exclusion and inclusion it will be possible to ascertain that the action of the Court was based upon a construction of the statute, and we are asked to review the case upon this theory. At best this proposition amounts to the contention that in every case where there is a doubt as to whether the Court construed the statute or interpreted the indictment, such doubt should be solved by an examination of the entire record. But the right to review in a criminal case, being controlled by the general law, it follows that a case cannot be brought within the control of the special rule provided by the Criminal Appeals Act, unless it clearly appears that the exceptional and not the general rule applies. Aside from this consideration, we cannot give our approval to the suggestion made by the Government since in effect, it virtually calls upon us to analyze and construe the indictment as a pre-requisite basis for the exertion of the limited power to review the action of the Court in interpreting the statute. Indeed, to follow the suggestion would be to frustrate the purposes which manifestly the jurisdictional act was enacted to accomplish; because the intent to expedite in criminal cases the decision of questions involving statutory construction, which was plainly one of the

ends for which the law was intended, would be of little avail if the right to review be extended by implication, so as to embrace cases not within the purview of the statute, thereby multiplying appeals and delaying the speedy decision of such cases."

And in *United States vs. Moist*, 231 U. S., 701, Mr. Justice Holmes writing the opinion, the Court there held (page 702) :

"There is nothing in the record showing any request made to the trial court for an expression of an opinion in such form as to manifest clearly whether its action proceeded upon a construction of the statute or merely upon the meaning which was given to the indictment and as it does not appear that the judgment turned upon any controverted construction of the statute, the writ of error must be dismissed."

And in *United States vs. Barnow*, 239 U. S., 74, Mr. Justice Pitney writing (page 79) :

"Since our review under the Criminal Appeals Act is confined to passing upon questions of statutory construction, we are not here concerned with the interpretation placed by the Court upon the indictment."

And in *United States vs. Biggs*, 211 U. S., 507, Mr. Justice White writing (page 518) :

"The right given to the United States to obtain a direct review from this Court of the

rulings of the lower court on the subjects embraced within the Statute of 1907, does not give authority to revise the action of the court below, as to the mere construction of an indictment, and therefore in the exercise of our power to review on this record, *we must accept the construction of the indictment made by the lower court and test its construction of the statute in that aspect.* * * *

"We think the conclusion cannot be escaped that the construction given by the court below to the indictment, was the result merely of the analysis which the court made of the indictment as an entirety, of its appreciation of the nature and character of the acts therein referred to and of the overt acts alleged, the whole read in the light of the elementary canons of construction, applicable to criminal pleadings."

We submit that the decision of the court below did not construe a statute and that the effect of the decision was not to pass upon the construction or validity of a statute, but merely to apply the elementary law of the effect of a former judgment.

The review sought by the Government herein is an indirect attempt to review the judgment of Judge Thomas, from which no appeal was taken.

POINT IV.*(Motion to dismiss.)*

The writ of error, assignment of errors and citation are defective, because they do not bring before this Court all the proper parties, they omit the names of some of the parties, and are insufficient to raise the only point appealable in such appeals as this, and are too general.

The citation, writ of error, etc., fail to state or raise the only point which would give this Court jurisdiction, i. e., that the Court below construed a statute.

They fail to bring before this Court all the proper parties, and fail to give the names of all the parties (Record, pages 2, 50, 51, compared with order; page 49, and indictment and opinion; pages 47, 16).

They are too general under the decision.

In order that this Court may have jurisdiction, the writ of error must contain words to the effect, "that the Court erred in the interpretation, construction or invalidity of a statute by," etc., etc., or else they do not raise the question that "the decision of the Court below construed a statute," for this is the only ground on which this Court will uphold jurisdiction of this appeal under all the cases reported.

This omission seems so evident from a reading of the assignments of error that we refrain from taking up each assignment of error separately, except to say that the words are missing and

the interpretation thereof to raise the necessary question means that this Court will do what it has repeatedly announced it will not do, to wit, look through and open the entire case to ascertain whether a possible error had been committed, which would give this Court jurisdiction when it is not distinctly raised in the writ and assignment of error and the opinion shows to the contrary.

In fact, the alleged assignments of error negative the assumption that the Court interpreted a statute by pointing out the reasons for the action of the Court below, which are clearly without the jurisdiction of the Court.

**THE ERRORS NOT CLEARLY ASSIGNED
WILL NOT BE NOTICED BY THIS COURT.**

Supreme Court, Rule 21, Subdivisions 2 and 4.

U. S. vs. Carter, 231 U. S., 492 (also quoted on another point).

George vs. Wallace, 135 Fed., 286.

Jones vs. U. S. ex rel. Tompkins, C. C. A., 135 Fed., 518.

Smith vs. Hopkins, 120 Fed., 921.

Craig vs. Dorr, 145 Fed., 307.

Ireton vs. Penn. Co., 185 Fed., 84.

Van Stone vs. Stillwell & B. Co., 142 U. S., 128.

Stevenson vs. Barbour, 140 U. S., 48.

The writ of error is otherwise defective, for a writ of error is an institution of a new suit in the Court of Review.

Simpson vs. First Nat. Bank, 129 Fed., 257-279.

And it therefore ought to state clearly the names of all the parties.

Mr. Justice Miller, in *Mussina vs. Cavazos*, 6 Wall., 355, at page 361, says:

"But many cases have been dismissed by this Court because the writ of error described either the plaintiff or defendant as A, B and others," etc. * * *

Godbe vs. Tootle, 154 U. S., 576.

Hardee vs. Wilson, 146 U. S., 179, at 181, and cases cited.

In this last case, which is a civil case, one of the reasons given applies with equal force to a criminal case (see page 181):

"That the Appellate Tribunal shall not be required a second or a third time to decide the same questions on the same record."

Smythe vs. Strader, 12 How., 327.

Davenport vs. Fletcher, 16 How., 142.

The writ is defective because it leaves out some names and puts in only one and states, "et al." for the others.

Deneale vs. Archer, 8 Pet., 526.

Miller vs. Mackenzie, 10 Wall., 582.

And this was held so even where the party's firm name was stated instead of individually.

"The Protector," 11 Wall., 82.

Moore vs. Simons, 100 U. S., 145,

and where the writ of error omitted the parties named in the citation, the Court dismissed the writ, although in this case the citation is also defective.

Kaile vs. Wettmore, 6 Wall., 451.

Sea vs. Mutual Conn. Life, 154 U. S., 659.

We do not contend that this Court has not power to allow a proper amendment at any time, if a motion therefor is made but this writ cannot properly or legally be amended now, for no citation was served on the remaining defendants and time to appeal has expired as against them, and it therefore does not bring all the necessary parties before this Court.

The order dismissed the indictment not as to one but all (see Record, page 49).

If the appeal were against all and the title merely was incomplete it might be amended on application, but here we have a citation, writ of error, etc., against one, in a case against six and no application to amend, which if now applied for must be denied, as it would bring in parties now against whom no appeal was taken, and no citation served and who could not now be heard. The government's argument (brief, page 33) may apply to any crime but conspiracy, the charge here, for there never could be a legal trial on this indictment as against one only. The argument that the government in criminal cases has a right to select against whom it will take the appeal,

would in effect be, that after one writ had failed against one defendant, another might be brought up, thus, bringing successive appeals in the same case.

The anomalous situation now presented is, an opinion has been filed and order entered quashing the indictment as to the "defendants," and the Clerk has so entered on the docket and indictment (see Record, page 23) in accordance with the opinion and order pages 16 and 49, yet here only one defendant is prosecuted on this appeal (the charge being conspiracy), which appeal if successful, would not affect the other defendants, since the time to appeal as to them has expired, and so leave the order on the last indictment in effect as to five defendants and destroyed as to this defendant.

Therefore, the proper parties are not before the Court and cannot now be brought before the Court, and no question is raised by the assignments of error which would give jurisdiction to this Court, and the writ of error, assignments and citation being defective in not containing the names of the various defendants, and too general to raise an appealable question under the criminal appeals act, the writ of error and the appeal should be dismissed.

POINT I.

(On the writ of error.)

(If this Court should go beyond the motion to dismiss, the defendant-in-error submits for its consideration the following.)

The action of the lower Court in holding that the prior judgment was a bar to the prosecution of the last indictment was correct.

The judgment of Judge Thomas sustained the demurrer to the first indictments (fol. 14), and his action was based upon the ground that the Statute of Limitations barred the prosecution (opinion, record, page 45). This was a final judgment on the merits. There can be no question that the plea of the Statute of Limitations goes to the merits of the indictment, and that a judgment thereon operates as an acquittal, for this Court has so held in *United States vs. Barber*, 219 U. S., page 72, Chief Justice White writing (page 78):

"The plea of the statute of limitations does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant, the judgment is necessarily an acquittal of the defendant of the charge." (Italics ours.)

This upheld in the exact words of the government, its contention in that case, the benefit of which the government now seeks to deprive this defendant.

The government's contention (brief, page 18) does not apply here, for there is no claim here of "former jeopardy," or any claim that "a ruling on a plea before jeopardy will preclude the bringing of a *new indictment* for the same offense and a trial thereunder." We may admit this can be done *but it must be a "new indictment," not the same indictment already passed upon by a Court of competent jurisdiction.* In every case cited by the government, it will be found there was a "new indictment," that is, one curing the defects, omissions and faults of the previous one, but in this case it has already been held (and that is not appealable) that the second indictment is not a "*new one*," but is legally identical with the first. The evident contention of the government that "new" before "indictment," means "another" with the same errors, defects and omissions of the first, would lead to a ridiculous conclusion.

A judgment entered upon a plea or demurrer which goes to the merits, is a final judgment.

"Where a demurrer is general, going to the merits of the offense, then a judgment for the defendant relieves him from further prosecution."

Wharton's Crim. Pl. & Pr., 9 Ed., Section 406.

"If the defendant succeeds in his demurrer on any mere formal exception, he only obtains a little delay, for the judgment is, that the indictment be quashed, and the defendant will be detained in custody until another accusation has been preferred against him. But

where the legal exception goes to show the facts stated on the record do not amount to a felony, the defendant will be altogether discharged."

Chitty, Crim. Law, Vol. 1 (1816), pages 442, 443.

To the same effect see also,

Bishop's New Crim. Proc., Vol. 2, Section 781 and note.

Stephen's Digest of Crim. Proc., Art. 258, page 171.

Queen vs. Houston, 2 Crawford & Dix, 310.

In this case the defendant demurred to the indictment, the demurrer was sustained and he was discharged. Upon writ of error by the prosecution the judgment was reversed and upon motion to sentence the defendant, the Court held after stating the facts, page 316:

"The question was argued before Baron Foster, and judgment was pronounced by him in favor of the demurrer, and this amounted to an acquittal on the indictment, the judgment being 'quod eat sine die.' The case was then brought before this Court by writ of error and we were all of opinion that the judgment which had been pronounced in favor of the demurrer was erroneous, and should be reversed. In consequence of this, the Crown sought, in addition to the reversal of the judgment, that sentence of condemnation should be pro-

nounced against the prisoner by this Court for the offence charged in the indictment. * * * But the real question now before the Court, is whether this Court has authority not only to reverse the judgment of the Court below allowing the demurrer, but also to pass sentence on the prisoner? * * * The judgment of the Court below in this case was a final judgment of acquittal; with that judgment alone this Court had to deal on the writ of error * * *. In the present case, therefore, the Court is of opinion that it has fully and properly exercised its jurisdiction in reversing the judgment of the Court below allowing the demurrer, *which amounted to an acquittal, but which acquittal is put out of the question by the reversal of the judgment.* There is nothing, therefore, to prevent the Crown from sending up new bills of indictment against the prisoner." (Italics ours.)

The rule as laid down by Chitty, Wharton, Stephens and Bishop, has been adopted in the Criminal Codes of many of the States, and it was necessary to add the power of resubmission which now can be done only after direction of the Court. Thus in the Code of Criminal Procedure of the State of New York, we find:

Sec. 327. "If the demurrer be allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the Court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, direct the case to be re-submitted to the same or another Grand Jury."

It certainly is not too much to say that the elusive rules of the common law have found their proper expression in these Codes, and that they command respect if only for the reason that all codification is as a rule, based upon what was the common law.

On a statute of this sort, it has been held :

"It is suggested that the judgment was required to be final only as to the indictment to which the demurrer was sustained, but we are of the opinion that it is also final as to the issues presented by the demurrer. If the indictment shows that there cannot be a valid conviction for the offense charged, reason and sound public policy demand that the proceedings be terminated, and that neither the state nor the defendant be subject to the expense or annoyance of further proceedings which cannot end in conviction."

State of Iowa vs. Field, 106 Iowa, 406,
page 412.

This case clearly demonstrates the reason for the rule.

Where it has been adjudicated that an indictment is barred by the statutes of limitations, there is nothing in reason or public policy, which requires that the prosecutor shall seek another indictment putting the defendant to further useless expense, disgrace and annoyance. And because after the judgment has been rendered and after it has become finally established by failure to appeal or review it, another rule is laid down, which shows it to be erroneous, is no reason why it should be re-opened. This is a collateral attack, and whether

the judgment was erroneous or not, the judgment is final.

"An erroneous acquittal standing unreversed is a sufficient foundation for the plea of *autrefois acquit*."

Archbold's Crim. Pl. & Ev., 21st Edition,
149.

"Where a petition on a cause of action, appearing on its face to be barred by the Statute of Limitations, is demurred to for that reason, and the demurrer is sustained and another suit is subsequently brought upon the same cause of action, the petition therein alleging facts showing that the statute has not run, the latter suit cannot be maintained, as the demurrer to the first suit, although error, was a former adjudication and a bar to any other suit."

Wells on Res Adjudicata, Section 274.

A judgment on demurrer is as conclusive as one rendered on proof. This Court has held, in case of Northern Pacific Bank vs. Slagt, 205 U. S., 122, at page 130:

"It is well established that a judgment on demurrer is as conclusive as one rendered on proof."

And at page 132:

"Especially where the demurrer was not merely formal, but went to the merits."

Citing authorities.

In *Lamar vs. United States*, 240 U. S., 60, the following language is used (page 65) :

"The objection that the indictment does not state a crime against the United States goes only to the merits of the case."

In *Detroit, etc., vs. Mich. R. R.*, 240 U. S., 564, at page 571, Mr. Justice Van Devanter says, referring to Section 237 of the Code :

"All judgments and decrees which determine the particular cause are final in the sense of the statute."

Citing cases.

And in *Mt. Vernon Cotton Co. vs. Alabama Power Co.*, 240 U. S., 30 :

"Judgment finally disposing of petition for writ of prohibition is final judgment. The fact that denial of writ does not decide the merits of principal suit is immaterial."

There was and is a valid existing judgment on the merits dismissing the first indictments, unappealed from and unreversed.

We are, therefore, brought to the question, did this judgment preclude further prosecution? whether as *res adjudicata* or by reason of its being an acquittal of the defendant.

The case of *Commonwealth vs. Gould*, cited by the government (brief, page 20), can best illustrate our point conclusively. In that case the first

indictment was dismissed because it failed to state the dimensions of the mortal wound. Suppose the second indictment was identical and didn't supply the omission, could there be any doubt that the former judgment would apply and the doctrine of res adjudicata applied?

The Criminal Appeals Act contains a provision that appeals thereunder can only be taken within thirty days of the judgment. What then becomes of this provision when by these devious means a prosecutor can allow the time to expire and so again and again indict on an indictment identical with the first, and although the time for appeal has expired, contend on appeal from the second that it raises the same question and so wipe out the benefit of the first decision, for in this case Judge Thomas said in deciding the original indictment (Rec., page 46) on the first demurrer and pleas, "other questions besides limitation were submitted which were of 'vital importance and decisive.'"

The government cites many cases in support of the doctrine of former jeopardy. There can be no question of the application of that doctrine. The question here is not former jeopardy, but a binding judgment on a definite question exactly the same as the one raised by the present indictment. The following cases fully support the contention of the defendant-in-error:

Commonwealth vs. Ellis, 160 Mass. (1893), page 165, in which Holmes, J., was one of the Court, the following language is used:

"A fact once determined by a court of competent jurisdiction in a criminal proceeding, cannot again be litigated between the same

parties unless a different rule applies to criminal proceedings from that which obtains in civil proceedings; but it is well settled that the rule is the same in both classes of cases."

See also *Galston vs. Hoyt*, 3 Wheat. at page 316; decision by Story, J.

Reg. vs. Haughton, 1 El. & Bl., 501.

Rex vs. Brown, 17 Cox Criminal Cases, 79.

Regina vs. Houston, *supra*.

* * * * *

The general rule as to how far judgments are controlling, is well stated in the case of *Coffey vs. United States*, 116 U. S., 436, at page 445, where it was held:

"Blatchford, J. The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as a defense, conclusive, between the same parties, upon the same matter directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, rising incidentally upon any question in another court, for a different purpose."

See also

Bissel vs. Spring Fall Township, 124 U. S., at 225, page 233.

Bouchaad vs. Dias, 3 Denio (N. Y.), 238.

Or again, as it has been stated in *State vs. Wear*, 145 Mo., 162, page 205:

"The pendency of a cause in a court where jurisdiction exists, and has been acquired in a lawful manner, is a test of the continuance of such jurisdiction, and of its valid exercise until final disposition is made of the cause, no matter how flagrant may be the errors which attend the exercise of such jurisdiction, nor how numerous and obvious may be the errors with which the record abounds, because the jurisdiction to decide right, being once conceded, such concession necessarily embraces the power to decide wrong, and a wrong decision though voidable, and though it may be avoided, yet until avoided is equally as binding as a right one; it cannot be attacked collaterally; the only way its binding force can be escaped or avoided is by appeal or writ of error. Outside of these two methods, it is impregnable to all assaults. This doctrine is as ancient as the law itself and abounds in every treatise where judgments and jurisdiction of courts are mentioned or commented upon."

The Government contends that this doctrine of *res adjudicata* or *estoppel* is peculiar to the civil side of the Court and not known to the criminal law Government brief, page 20, but *there is no reason why this rule should not be applicable to both civil and criminal proceedings. Its very foundation in the law of this country was a celebrated criminal case in England, that of*

Rex vs. Duchess of Kingston (1776) 20
State Trials at 538 and elsewhere

which has been quoted and relied on in the decisions of this Court and every United States Court,

besides the State Courts when the question of res adjudicata was raised, in criminal or quasi criminal proceedings and civil matters, not once, but hundreds of times.

In that case numerous citations of counsel show that res adjudicata has been applied to criminal law long before that time and it has been repeatedly applied in criminal proceedings, as shown by this brief.

See also

State vs. Wear, 145 Mo., 162, 193:

"Conceding for the purpose of argument only, that the facts disclosed by the record, did not justify Judge Mauldin in making the order discharging the defendant and that it was arbitrary exercise of judicial power, as to which the law affords the State no redress, to the end that defendant should go acquit of the crime charged against him, it is sufficient that the order when made, operated as an acquittal of the defendant, and that he could not thereafter be indicted and put upon trial for the same offense."

And in any view of the case, Judge Pope was bound by the rulings made by Judge Thomas as long as these rulings stood unreversed.

District of Columbia vs. Brewer, 37 Washington Law R., 64,

Where it was in effect held:

"Where on a former appeal a judgment for plaintiff was reversed on the ground that he

had no right of action because of his contributory negligence, and, the cause was remanded for a new trial, the ruling so made by this Court constituted the law of the case on the second trial, notwithstanding the fact that, pending such re-trial, the Supreme Court of the United States in deciding another case from this Court to which the rule announced by this Court on the former appeal had been applied, had discussed the decision of this Court on such former appeal and declared the rule announced therein to be erroneous, the Court saying (page 65) :

"The Court (U. S. Sup. Ct.) repudiated the doctrine announced by us in this case, but left the decision exactly where it was, and while the rule announced by the Supreme Court will control and govern in future cases in this Court, it affects this case no more than it does any other case previously disposed of by us."

See also

Oglesby vs. Attrill, 14 Fed. Rep., 214-215,

where one Judge refused to review question examined and passed upon by another.

We therefore submit that the Court below was within the law when it applied the bar of the former judgment. To hold otherwise would now send the defendant back for trial on an indictment identical with one where there is a final judgment entered in the same court between him and the government clearly to the effect that he cannot be prosecuted for the very offense on which he will be prosecuted.

We further submit that irrespective of all the questions raised by either side, nothing else need be considered on this appeal, for even if the pleas should be held to be in bar, and the decision of the Judge below held to construe a statute, yet the bar of this existing judgment prevents a reversal in this case.

POINT II.

(On Writ of Error.)

The present indictment in the case at bar, in legal effect, is exactly the same as the one before Judge Thomas. It contained no new matter which constituted either a new crime or a new overt act.

The Government, by its brief, Point V, seems to place considerable stress upon the proposition that the present indictment contains a new additional overt act, and hence destroys the claim of the defendant in error that the judgment to the former indictment is not conclusive.

The contention of the Government necessarily involves two questions.

(A) If the Court was wrong in its conclusion that the indictment is the same, can such conclusion be reviewed upon this Writ of Error?

(B) Will this Court undertake to place its own construction on the similarity of the alleged facts designated as an additional overt act to those of the previous indictment.

On the cases already cited, both of these propositions, as it seems to defendant in error, must be answered in the negative, but on analysis it will be found both indictments legally identical.

Under the statute on which this Writ of Error comes to this Court, this Court has no power to attempt to construe the legal effect of an indictment, the sufficiency of an overt act, or to review a finding upon those subjects by a trial Court (see cases, *supra*).

Assuming that the Court may seek to ascertain the sufficiency of the allegations claimed to be new and important, some of the matter which moved the Court below is set forth.

Section 5440 of the Statutes, in defining the crime of conspiracy, provides that an overt act must occur "to effect the object of the conspiracy." This indispensable element involves the necessity of pleading a fact. That is, that the act done designated as an overt act must "effect the object of the conspiracy," and the pleader must so plead the fact that the Court can see that the alleged act designated as an overt act does have the effect of carrying out or effecting the carrying out of the incompleted conspiracy, and mere conclusion on the part of the pleader that a certain act does effect the object of the conspiracy, is not pleading a fact.

To illustrate, the indictment in question sets forth an alleged conspiracy to conceal assets from a trustee in bankruptcy. If the pleader saw fit to recite that the defendant in error, to effect the object of the conspiracy recited in the indictment, on a certain day denied that he was a conspirator, and prefaced that allegation by the pleader's conclusion that the fact, called an overt act, did ef-

fect the carrying out of the conspiracy, no lengthy argument is required to demonstrate that that fact is not well pleaded.

Applying this example to the alleged facts pleaded in the indictment claimed by the Government to be new in character, the Government in substance sets forth that the defendant in error in a certain proceeding in bankruptcy against Abraham & Lesser, denied that he received a counsel fee, two years before, from Joseph Samuels & Co., another client (R., page 20).

It needs no extended argument to see that the alleged act was not an act at all, merely a denial of an alleged act which was alleged to have occurred two years before the hearing.

As stated by Judge Pope (Rec., page 48):

"An examination of the additional overt act alleged in the last indictment leads to the view that, notwithstanding certain conclusions of law therein set forth, the matters therein stated cannot, from their nature, constitute an overt act under the conspiracy alleged in each of the indictments. It follows, therefore, as stated above, that the two indictments are legally identical."

United States vs. Hyde & Schneider, 225 U. S., 348 and cases cited.

"An overt act must be a beginning, a step, in its (the conspiracy's) execution."

See Salas vs. U. S., June, 1916, C. C. A. 2nd Circuit.

So, too, the testimony was submitted, and is before this Court to show that the testimony alleged

never was given, hence there was no overt act (see Record, pages 29 at 30, fols. 52, 53). The testimony shows defendant admitted receiving \$1,200 from Joseph Samuels & Co., his denial of the receipt of moneys was from Abrahams & Lesser, while the indictment is based on the concealment of assets of Joseph Samuels & Company.

These are concrete examples of how the entire case would be opened here by Government's contentions, and this Court would then have before it the other questions in reference to the overt act which were before the Court below, as for instance. The indictment shows the assets concealed in 1912, and the conspiracy complete when trustee was elected, hence no overt act could have been done by one conspirator in 1914 as alleged.

In re Black,¹⁶⁰ Fed. Rep., 431, 147 Fed., 837.

United States vs. Pettiborne, 148 U. S., 193.

United States vs. Hyde & Schneider, *supra*.

The act must have the conspiracy in view and have some power to affect it. And in United States vs. Lonabaugh, 179 Fed., 476, Judge Van Devanter, writing, says:

"When the object of the conspiracy is attained, there cannot be a further overt act."

So, too, the act must be one that does not negative a wrongful purpose. Here it is set forth the money was to be paid as a counsel fee, which still is a legal payment—and once paid, defendant cannot be accused of conspiracy to conceal bankrupt's assets, if it was the property of defendant in error as the indictment itself infers.

United States vs. Waldman, 199 Fed., 753.

"It is not a criminal offense for a person who is not a bankrupt to conceal property from the trustee."

The government's brief, page 26 states that all the acts in the first indictment took place in 1912, and seeks to show such is not the case in the last indictment, but a casual reading shows the last indictment, too, sets forth *all acts* in 1912, only the passive recital in 1914 of an alleged act in 1912.

The Government is also in error, brief page 28, in saying:

"Had the defendant in error testified truly that he received and collected the note of \$897.36, the referee could have ordered him forthwith to return the money to the trustee."

The record before this Court, page 30, shows this defendant did admit the receipt of \$1,200.00, and no such order could be made, for the indictment itself alleges the payment as "counsel fee." The government's brief, page 29, shows its entire theory of the case is wrong when it makes the colossal error of saying:

"The alleged false statement was made before a referee who was endeavoring to ascertain what had become of the assets of the estate."

This is shown by record, page 29. *The hearing was on application for an allowance as counsel fee in another case*, and the indictment itself, record, page 20, alleges:

"At a hearing in support of an application for an allowance, he testified, etc."

The statement on page 28, Government's brief, then becomes ridiculous that "the testimony deprived the estate of assets," the indictment and record show the money if paid was paid in 1912, the testimony in 1914 deprived no one of anything.

If the Court looks into these questions, it will be seen that there was no overt act alleged in the last indictment to differentiate it from the former ones and the former judgment controls.

CONCLUSION.

The pleas below were a demurrer and motion to quash and not a plea in bar. In either case the Court did not construe a statute, so the writ of error should be dismissed.

The citation, writ of error, are factually defective.

The doctrine of former judgment applies to all cases and proceeding in all courts, and the identical question having ^{been} settled by a previous final judgment between the parties the judgment of the Court below now attempted to be reviewed was right, and the appeal should be dismissed and judgment affirmed.

Respectfully Submitted,

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UNITED STATES *v.* OPPENHEIMER ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

No. 412. Argued October 19, 20, 1916.—Decided December 4, 1916.

A "motion to quash" an indictment, based upon a former adjudication that a previous indictment for the same offence was barred by the statute of limitations, *held*, in substance, a plea in bar. *United States v. Barber*, 219 U. S. 72, 78.

Under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, the right to review decisions and judgments sustaining special pleas in bar is not limited to cases in which the decisions or judgments are based upon the invalidity or construction of the statutes upon which the indictments are founded. *United States v. Keitel*, 211 U. S. 370, and *United States v. Kissel*, 218 U. S. 601, explained and distinguished.

A plea of the statute of limitations is a plea to the merits.

A judgment for defendant that the prosecution is barred by limitations goes to his liability in substantive law; and, in whatever form the issue was raised, such a judgment may be interposed as a conclusive bar to another prosecution for the same offence.

The Fifth Amendment, in providing that no one should be twice put in jeopardy, was not intended to supplant the fundamental principle of *res judicata* in criminal cases.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren, with whom Mr. A. J. Clopton was on the briefs, for the United States.

Mr. Benjamin Slade, with whom Mr. L. Laflin Kellogg and Mr. Abram J. Rose were on the briefs, for Oppenheimer.

MR. JUSTICE HOLMES delivered the opinion of the court.

The defendant in error and others were indicted for a conspiracy to conceal assets from a trustee in bankruptcy.

Act of July 1, 1898, c. 541, § 29; 30 Stat. 544, 554. The defendant Oppenheimer set up a previous adjudication upon a former indictment for the same offence that it was barred by the one-year statute of limitations in the bankruptcy act for offences against that act, § 29d; an adjudication since held to be wrong in another case. *United States v. Rabinowich*, 238 U. S. 78. This defence was presented in four forms entitled respectively, demurrer, motion to quash, plea in abatement, and plea in bar. After motion by the Government that the defendant be required to elect which of the four he would stand upon he withdrew the last-mentioned two, and subsequently the court granted what was styled the motion to quash, ordered the indictment quashed and discharged the defendant without day. The Government brings this writ of error treating the so-called motion to quash as a plea in bar, which in substance it was. *United States v. Barber*, 219 U. S. 72, 78.

The defendant objects that the statute giving a writ of error to the United States "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," Act of March 2, 1907, c. 2564, 34 Stat. 1246, is limited like the earlier clauses to judgments based on the invalidity or construction of the statute upon which the indictment is founded. But that limitation expressed in each of the two preceding paragraphs of the statute is not repeated here. The language used in *United States v. Keitel*, 211 U. S. 370, 399, had reference only to the construction of the indictment and to its sufficiency upon matters not involving a statute, in cases brought up by the United States under the earlier clauses of the Act. That quoted from *United States v. Kissel*, 218 U. S. 601, so far as material also meant that the sufficiency of the indictment would not be considered here upon a writ of error to the allowance of a plea in bar. In view of our opinion upon the merits

242 U. S.

Opinion of the Court.

we do not discuss the preliminary objections at greater length.

Upon the merits the proposition of the Government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the Fifth Amendment that a person shall not be subject for the same offence to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offence charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the Government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue, *United States v. Kissel*, 218 U. S. 601, 610, but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. *Iowa v. Fields*, 106 Iowa, 406. Wharton, Crim. Pl. & Pr., 9th ed., § 406.

Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits, *United States v. Barber*, 219 U. S. 72, 78, and however the issue was raised in the former case,

after judgment upon it, it could not be reopened in a later prosecution. We may adopt in its application to this case the statement of a judge of great experience in the criminal law: "Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings." Hawkins, J., in *The Queen v. Miles*, 24 Q. B. D. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Commonwealth v. Evans*, 101 Massachusetts, 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins says. *Commonwealth v. Ellis*, 160 Massachusetts, 165. *Brittain v. Kinnaird*, 1 Brod. & B. 432. Seemingly the same view was taken in *Frank v. Mangum*, 237 U. S. 309, 334, as it was also in *Coffey v. United States*, 116 U. S. 436, 445.

The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter v. Hewitt*, 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time.

Judgment affirmed.